Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

FRATERNAL ORDER OF POLICE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals For The D.C. Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Tenth Amendment bar federal control over the qualifications of State officers who deliver, receive and possess firearms necessary to discharge the officer's State duties?

II. Do the Second Amendment and Militia Clauses compel strict scrutiny of federal regulation of a State's right to empower its officers to deliver, receive, and possess public interest firearms in the discharge of State duties?

> If so, are equal protection principles offended by a federal regulation that punishes a single class of misdemeanants more harshly than all classes of felons?

III. Is application of the federal Gun Control Act to State officers discharging state duties wholly intrastate a constitutional exercise of Congress' Commerce Clause powers?

PETITIONER'S CORPORATE DISCLOSURE STATEMENT

Petitioner is a fraternal organization with no stock, no parent company and no holding company.

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OPINIONS BELOW AND JURISDICTIONAL STATEMENT

On April 16, 1999 a panel of the United States Court of Appeals for the D.C. Circuit reversed its prior decision and affirmed the trial court by reported opinion reproduced in the appendix at *A/1-20*. The same panel had reached a contrary result on August 28, 1998, reproduced in the appendix at *A/21-33*. The Federal District Court for the District of Columbia granted summary judgment against FOP on October 2, 1997. The reported memorandum opinion is reproduced in the Appendix at *A/34-46*.

The United States District Court for the Washington D.C. District had jurisdiction over this case pursuant to 28 U.S.C. § 1331 and § 1343. The United States Court of Appeals for the District of Columbia Circuit assumed jurisdiction pursuant to 28 U.S.C. § 1291 and § 1294. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. The judgment appealed from was entered by the U.S. Court of Appeals on April 16, 1999 and disposed of the Government's timely petition for rehearing arising from its August 28, 1998 loss.

APPLICABLE LEGAL PROVISIONS

The applicable legal provisions are set forth in a separate appendix.

STATEMENT OF THE CASE

A September 1996 amendment to the Gun Control Act of 1968 makes it illegal for any person "convicted in any court of a misdemeanor crime of domestic violence" to ship, receive or possess firearms or ammunition that affect interstate commerce. 18 U.S.C. § 922(g)(9). Unlike all other firearm disabilities in 18 U.S.C. § 922(g), the 1996 amendment applies to state officers whose state duties require that they carry firearms. *See* 18 U.S.C. § 925(a)(1). 18 U.S.C. § 922(d)(9) imposes criminal penalties on any person, including Chief Law Enforcement Officers ("CLEOs"), that provide firearms to state officers with the disabling conviction of § 922(g)(9). Because most States do not define a separate crime of "domestic violence", Congress also defined the elements of the predicate misdemeanor crime of domestic violence. *See* § 921(a)(33)(A) and (B).

On November 26, 1996 the Bureau of Alcohol, Tobacco and Firearms, ("ATF") issued an "open letter" addressed to "All State and Local Law Enforcement Officials," *A/55-60*, stating the 1996 amendments criminalize delivery or transfer of firearms by non-federal "government agencies" to disabled misdemeanants, *A/55*, and state officers "performing their official duties" are subject to the criminal penalties. *A/57; A/26; A/35 fn2* The letter noted a CLEO's obligation to "determine" who among their employee officers was affected and to take "appropriate action". *A/57* According to ATF appropriate action means affected officers "must immediately dispose of all firearms and ammunition in their possession." *A/57*

On January 21, 1997, the Fraternal Order of Police ("FOP") filed a complaint for declaratory and injunctive relief against the ATF in the U.S. District Court for the District of Columbia. The complaint challenged the constitutionality of the 1996 amendments. The complaint alleged the enactments violated the Tenth Amendment by trenching on the states' authority to establish qualifications for its firearm carrying officers under the explicit terms of the federal constitution and, to determine its own approach to domestic violence, including the fixing of civil or criminal liabilities. FOP also argued that non-federal public interest firearm delivery, transfer and possession was not a commercial transaction within the reach of Congress' commerce clause power. The complaint also alleged the ban was underinclusive, and failed to pass equal protection muster because it disabled only a single class of violent misdemeanant, while leaving all other violent misdemeanants unaffected, and strict scrutiny of the class-based amendments obtained because they burdened the Second Amendment right to deliver, transfer and receive a public-interest firearm. Later, at oral argument counsel identified the further irrationality that felons may continue to possess public-interest weapons under § 925 but previously convicted domestic violence misdemeanants may not. *A/4*

On October 2, 1997, the District Court granted the government's motion. *A/44* The court found FOP had standing because the threatened injuries to its frontline-officer members were "traceable" to the federal government through the ATF, *A/38* but found the "Tenth Amendment is not implicated . . . " *A/43* The FOP's commerce clause argument was rejected because

§ 922(g)(9) contains a "jurisdictional element" that a firearm possessed in violation of § 922(g)(9) be proven to be "in or affecting commerce." *A/38-39* Strict scrutiny was denied on the equal protection claim citing *United States v. Miller*, 307 U.S. 174 (1939), for the principle that the Second Amendment only states a fundamental right to possess a militia related weapon and public interest firearms carried by law enforcement officers are not militia related. *A/40*

In November 1997 FOP appealed to the U.S. Court of Appeals for the D.C. Circuit, arguing that the delivery, transfer and possession of firearms by state officers executing state duties is not a commercial event subject to Congress' commerce clause power, and that the Second Amendment and Militia clauses stake out inviolable areas of state sovereignty upon which Congress may not trench pursuant to the Tenth Amendment. FOP also argued the Second Amendment compelled strict scrutiny of the statute's impact under the FOP's equal protection claim. It was undisputed between the parties that FOP members included elected sheriffs and state officers whose qualifications and duties are fixed by the sovereign states. The panel, relying on the standing of the FOP's CLEO affidavits to establish injury in fact, *A/24*, found the enactment's harsher treatment of misdemeanants than felons offended equal protection principles under the most permissive standard of review, and reversed. *A/27-32* None of the other constitutional issues were reached.

The government successfully petitioned for rehearing on the ground that the enactment's harsher treatment of misdemeanants who possess government issued firearms than identically situated felons was rational, *A/3*, arguing

Congress *could have* believed that state and local police departments have policies against hiring and retaining persons convicted of violent felonies and Congress *could have* believed that the hiring of violent misdemeanants by these agencies posed a far more significant real-world problem than felons becoming law enforcement officers. *A/3* The FOP responded that inverting existing state criminal law frameworks and singling out for greater recidivist consequence a single class of violent misdemeanants and ignoring all violent felons was irrational and constituted invidious discrimination. In addition, the FOP objected to positing the control of state officers as a rational purpose under the Fifth Amendment contending a Congressional purpose of controlling whom may be empowered by the states to issue and possess a public interest firearm states a violation of the Tenth Amendment. *A/17* The panel agreed the Government had presented a "conceivable" set of facts that satisfied rational basis scrutiny and reversed its prior decision. *See A/9-10* (Court's discussion).

The panel summarily reached the other constitutional issues. Although the panel found state CLEOs were being "effectively used by the government" to implement the new enactments, *A/8; A/26,* there was no Tenth Amendment trenching "because § 922(g)(9) does not force state officials to do anything affirmative". *A/15* Even when the Court assumed *arguendo* that the amendments intruded directly upon the states' power to determine the qualifications of her officers empowered to carry firearms as part of their official duties, it held the Tenth Amendment

was not implicated because this Court "no longer" recognizes "intrusion in this form" as stating a Tenth Amendment violation. *A/17* The Court rejected the contention that the Second Amendment and Militia clauses stake out inviolable areas of state sovereignty upon which Congress may not trench pursuant to the Tenth Amendment, because CLEO and line-officer weapons were not demonstrated to be "militia related". *A/14-17*

ARGUMENTS FOR ALLOWING THE WRIT

Every law enforcement agency in the Nation, every state Militia, every National Guard unit and every commanding officer of the United States military is impacted by the 1996 amendments to the Gun Control Act. Until 1996 Congress recognized that the prohibitions on firearm receipt, delivery and possession appearing in the Gun Control Act may not be applied to firearms issued for the use of "any State or any department, agency, or political subdivision thereof." *See* 18 U.S.C. § 925(a)(1). The 1968 enactment of § 925(a)(1) was necessary; it was the provision that allowed the Gun Control Act to pass Tenth Amendment, Second Amendment and Militia Clause muster. *See e.g.* Firearms Owners' Protection Act, § 1(b), 100 Stat. 449 (1986) (codified at 18 U.S.C. § 926 (1986)) (hereinafter "FOPA") (noting GCA purpose of preserving Second and Tenth Amendment rights) The Gun Control Act of 1968 respected the States' historical role as the sovereign and dominant authority with respect to its own issuance and possession of firearms. *See Printz v. United States*, 521 U.S. 898, 905 (1997) (historical evidence that "earlier Congresses avoided use of [the] highly

attractive power [to compel state executive officers to administer federal programs]" gave us "reason to believe that the power was thought not to exist")

Now, for the first time in our Nation's history Congress has conferred on itself the power to control the qualifications of these officers. *See e.g. Alden v. Maine*, 1999 U.S. LEXIS 4374, 4439 (June 28, 1999) (citing *Printz*, noting early Congressional practice suggests no federal power over state issued firearms) In addition to imposing the first constraints on public-interest firearms, Congress irrationally imposed the harshest recidivist measure *only* on misdemeanants, and on a single class of misdemeanants at that. *See* 18 U.S.C. § 922(d)(9) and (g)(9); *A/47-51*. In light of the importance of the federalism questions presented, the sheer number of agencies and officers affected, and the inevitability of repetition of this lawsuit in every Circuit, and the conflict between the D.C. Circuit's decision and relevant decisions of this Court, the requested writ should issue.

A. The 1996 GCA Amendments Violate the Tenth Amendment and Principles of Federalism as Expressed in the Relevant Decisions of this Court.

The Court of Appeals' refusal to declare explicit federal control of state officers and their firearm related duties a violation of the Tenth Amendment conflicts with the decisions of this Court in *Printz v. United States*, 521 U. S. 1033 (1997) and *United States v. Lopez*, 514 U.S. 549 (1995). The delicate federal/state firearm balance that had existed since our Nation's founding, and was reaffirmed in 1968 with the passage of the Gun Control Act, was

dramatically altered based upon nothing more than a floor speech of the amendment's sponsor that spoke nothing of commerce or federalism concerns, but only of domestic violence. *See* 142 Cong. Rec. S10377-S10378 (September 12, 1996) (Sen. Lautenberg) The legislation was a last-minute amendment to a defense appropriations act. *Id.*

The panel's rationale posits no limit on Congressional power over state officers with firearm related duties. Each state's constitution observes that the executive branch enforces the state's laws, and each state provides its militia power may be called upon by the governor to enforce the laws, including judicial decrees. *See e.g.* Colorado Const. Art. IV, Sec.5 The executive unity to enforce the laws through reliance on state law enforcement officers during times of peace and state militia members in times of emergency, would be shattered and the powers secured to all states by the Second Amendment and Militia Clauses irreparably diminished if Congress could defang a governor and a state by simply requiring state officers to disarm themselves.

1. The Court of Appeals Erroneously Concluded the States and the People Retain No Inviolable Sovereign Powers and the Decision Conflicts with this Court's Decisions in *Printz v. United States*, 521 U.S. 898 (1997) and *United States v. Lopez*, 514 U.S. 549 (1995).

The Court of Appeals noted the GCA 1996 amendments,

> [F]orbid the states to arm those members of their police forces, militias, or National Guards who possess disabling misdemeanor convictions; they criminalize both the officers' acceptance of the states' firearms and the provision of the firearms by any person, including (presumably) any state's representative.

A/23. Citing *Printz* the panel said,

> FOP's Tenth Amendment challenge fails because § 922(g)(9) does not force state officials to do anything affirmative to implement its bar on domestic violence misdemeants' possession of firearms.

A/15-16 The panel, citing *South Carolina v. Baker*, 485 U.S. 505, 511 (1988) and *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-54 (1985) expressly rejected the FOP's contention that the 1996 amendments trenched upon "inviolable" areas of state sovereignty. The reliance on *Garcia* and the unduly narrow construction of *Printz* are contrary this Court's recognition that the continued viability of the *Garcia* holding is suspect in light of *Printz*. *See Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 221 (1998).

> [E]ven as to matters within the competence of the National Government * * * the States retain a residuary and inviolable sovereignty.

Alden v. Maine, 1999 U.S. LEXIS at 4390-91 citing The Federalist No. 39, at 245 (internal quotations omitted).

> [E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . .

New York v. United States, 505 U.S. 144, 166 (1992). The holding in *Garcia* has been undercut by recent decisions of this Court. Local police departments charged with keeping the peace and protecting the public have been repeatedly cited as a primary component of State government. *United States v. Lopez*, 514 U.S. 549, 563 (1995); *Yeskey*, 118 S.Ct. 1952 (1998) (criminal law enforcement is a primary state function) Contrary to the panel's conclusion, this Court's cases secure inviolable areas of state sovereignty, and the 1996 GCA amendments trenched on the traditional state prerogative regarding state officer qualifications and public interest firearm issuance and possession.

2. The 1996 GCA Amendments Impermissibly Conscript State Officers to Enforce Federal Law Through the Threat of Criminal Sanctions.

This Court held in *Printz* that the Federal Government may not commandeer state legislative or executive agencies. The panel held § 922(d)(9) exposed all CLEOs to criminal penalties if the CLEO delivered a firearm to a police officer disabled by the new federal law, *A/26*, and that the CLEOs in this case complained that the new obligations under the federal law conflicted with their existing obligations under state law. *A/24* Curiously, the panel found CLEOs were "used by the government to implement [the law]," *A/26*, but no Tenth Amendment trenching occurred because the law "does not force state officials to do anything affirmative to implement [the law]". *A/15*

It was indisputed that a CLEO's compliance with both state and federal law is impossible because no state

has been identified as barring misdemeanants from delivering and possessing public interest firearms. Because law enforcement agencies transfer firearms to law enforcement personnel through CLEOs, the criminal penalty for transfer to a domestic violence misdemeanant is a *de facto* command from the federal government to a CLEO to disarm any state officer otherwise entitled to perform his firearm-related duties. Justice Scalia's observation in *Printz v. United States*, 117 S.Ct. 2365, 2382 (1997) is applicable: "[t]o say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance." The power to control the selection criteria of state officials empowered under state law to issue and possess public interest firearms, backed by the draconian threat of federal criminal prosecution, if it existed, would carry with it the power to control all of that States' law enforcement and military officers. *See e.g.* 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911) ("[t]he practicality of making laws, with coercive sanctions, for the States as political bodies" in Madison's words, "exploded on all hands")

The elected Sheriff CLEOs continue to face a "Hobson's choice" of following federal law and disarming or terminating the employment of an officer the State has trained, qualified and sworn to carry a public interest weapon, or following state law and arming the employee and facing federal criminal prosecution. The conscription of State officials to investigate other state officers and to disarm and likely terminate employment of the officer, when the officer is otherwise in full compliance with applicable state law, works a far worse intrusion on State sovereignty than was rejected in *Printz*.

3. The 1996 GCA Amendments Trench On the State's Inviolable Right to Empower Whomever it Desires to Issue and Possess Public Interest Firearms and to Experiment with Different Approaches to the Scourge of Domestic Violence.

The power to select important state governmental officials is,

> [R]eserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government.'

Gregory v. Ashcroft, 501 U.S 452, 463 (1991) (quoting U.S. Const., Art. IV, § 4). When Congress seeks to set social policy for the nation by means of its Commerce Clause power, however, "the authority of the people of the States to determine the qualifications of their government officials may be inviolate." *Id.* at 464.

> Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations.

Alden v. Maine, 1999 U.S. LEXIS at 4464. By imposing a firearm disability unknown at state or common law on state officers, Congress trenched on the state's entitlement to select its own officers under the federal constitution.

The People have an explicit right to retain firearms protected by the Second Amendment, and the States have an explicit right to determine the qualifications of their

militia officers under the Militia Clause in the U.S. Constitution. *See* Fed. Const. Art. I, Cl. 8. In addition, a State may provide and maintain at its own expense a defense force that is exempt from being drafted into the Armed Forces of the United States. *See* 32 U.S.C. § 109(c). All 50 states have hiring qualifications and training criteria for those empowered to issue and possess public interest weapons. Approximately four states have employment policies that evaluate prior misdemeanor conduct in any way. Civil rights deprivations for misdemeanor conduct is almost unknown at state law and restoration of rights lost by misdemeanants is equally unknown. Although the 1996 amendments rely on state convictions, no state criminal code punishes misdemeanants more harshly than felons, as do the 1996 GCA amendments. Finally, the state's ability to rely on its own carefully selected law enforcement officers in local and state emergency situations is significantly affected. Indeed, if Congress can initiate this interference, the gate is open to federal control to the point of disarming state militias and law enforcement agencies for other misdemeanor conduct.

> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Traditionally, misdemeanor convictions have been viewed as neither a material predictor of future violence, *Brown v. Bryan County*, 117 S.Ct. 1382, 1435 (1997) (Stevens, J., dissenting), nor a basis for

depriving a citizen of fundamental rights regarding firearm possession. *See* Halbrook, S., *Firearm Law Deskbook* (5/96 release) at Appendix A (cataloging State laws) (43 states have constitutional right to bear arms) (fewer than five states permit any kind of firearm disability for non-felonies, and those that do place temporal limits on the deprivation) Given the extensive intrusion on state prerogative occasioned by interfering with domestic relations law, criminal law, public interest firearm possession and emergency responses by state militia members, this Court should state a bright line rule that Congress must respect a state's sovereign right to empower whom it wishes to issue and possess a public interest firearm.

B. The 1996 GCA Amendments Should Be Subject to Strict Scrutiny Because they Burden A State Officer's Right to Possess Firearms Secured by the Second Amendment and Burden the State's Right to Select the Qualifications of its Militia Officers. The Amendments Are Plainly Irrational and Cannot be Saved by Positing a Purpose that Violates the Tenth Amendment.

The Fifth Amendment provides, *inter alia*, "No person shall . . . be deprived of life, liberty, or property, without due process of law." A legislative classification that "neither burdens a fundamental right nor targets a suspect class" passes muster "so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620 (1996). In this case the legislative classification fails because it irrationally burdens a fundamental right and because it does not seek a "legitimate" governmental

end. *See also Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (same)

1. The Second Amendment and Militia Clause Are Textual Guarantees that Congress May Not Interfere with Firearm Possession by State Officers. Any Federal Regulation Proposing to Control Firearm Possession by State Officers Discharging State Duties by Regulating the State Officer is Subject to Strict Scrutiny.

This Court has never fixed the substantive right protected by the Second Amendment. *See e.g. Printz v. United States*, 521 U.S. 898, 937-38 & n.1, 2, (1997) (Thomas, J., concurring) (citing *United States v. Miller*, 307 U.S. 174 (1939). The panel in this case noted the Second Amendment jurisprudence from this Court was "notoriously scant" *A/14* and even *Miller* was not "altogether clear" about the applicable standards. Clarification of the meaning of the holding in *Miller*, and modernization of the terminology of *Miller*, would greatly assist parties throughout the Nation and the federal courts. *Miller* predates the development of tiered equal protection jurisprudence and thus is in a jurisprudential vernacular not readily useful.

The panel refused to apply strict scrutiny to the Fifth amendment challenge because FOP "presented no evidence" demonstrating the law enforcement firearms possessed by FOP members were related to the "preservation or efficiency of a well-regulated militia". *A/14-15 Miller* involved an indictment arising from defendant's transporting a firearm interstate without having it properly

registered and without having in his possession a stamp-affixed written order. *Miller,* 307 U.S at 176. *Miller* thus involved a private citizen engaged directly in interstate travel with a private firearm. The instant case involves police officers operating wholly intrastate.

The *Miller* Court explicitly assumed every private citizen could challenge federal firearm regulation on the ground that the Second Amendment shielded the citizen's weapon from regulation because it, "has some reasonable relationship to the preservation or efficiency of a well regulated militia". *Miller,* 307 U.S. 178. A firearm that bore such a relationship would presumably be exempt from federal regulation. A well-regulated militia meant, "adequate defense of country and laws could be secured through the Militia – civilians primarily, soldiers on occasion." *Id.* 307 U.S. at 179. The purpose of securing safe execution of the laws in the townships and counties during times of crisis commends the law enforcement weapon as one that aids in the efficiency and preservation of the militia by definition. No able bodied male would willingly leave his family and fields if Sheriffs were not safely installed. Most state laws and constitutions refer specifically to the role of Sheriffs and police in times of militia mobilization. Under *Miller,* the FOP demonstrated its public interest firearms were entitled to Second Amendment protection. In today's equal protection parlance, the 1996 GCA amendments should have been subject to strict, rather than rational basis review.

Even leaving the precise language of *Miller* aside and asking the question in light of today's jurisprudence, fundamental rights are those established in the text of the Constitution. *See e.g. Thornburg v. American College of*

Obstetricians, 476 U.S. 747, 790 (1986) (White, J., dissenting) The Second Amendment and the Militia Clause secure explicit textual limitations on federal power. The beneficiaries of these protections are the "people" and the "States" respectively. This Court recently noted the phrase "the people" in the Second Amendment has the same meaning in both the Preamble to the Constitution and in the First, Fourth, Fifth, and Ninth Amendments. *United States v. Verdugo-Urquidez,* 494 U.S. 259, 265 (1990). Because of their contemporaneous proposal and passage, the amendments of the Bill of Rights are read by this Court in *pari materia,* and amendments which contain similar language are construed similarly. *Patton v. United States,* 281 U.S. 276, 298 (1930) Thus "the people", as used in the Second Amendment supports a holding that the right to keep and bear arms is a personal right. If the Second Amendment does not establish a personal right it surely cannot be understood to mean less than establishing a collective right to facilitate the availability of the militia.

This is a first impression case for this Court involving 18 U.S.C. § 925(a)(1) and public interest weapons. FOP established that its members are sworn law enforcement officers who carry public interest weapons intrastate. FOP established that its members include elected officials with fixed statutory duties the discharge of which requires they issue and possess firearms. Since FOP members are state officers with fixed state duties the firearms they possess are entitled to be shielded from federal regulation by the strictest scrutiny.

2. Different Penalties for the Same Offense Constitutes Impermissible Discrimination and Denies Equal Protection of the Laws on its Face.

> When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.

McGlaughlin v. Florida, 379 U.S. 184 (1964) citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). The distinction between felonies and misdemeanors was well-established at common law, *see* Wayne LaFave & Austin Scott, Criminal Law, Section 1.6, at 30 n.1 (2nd ed. 1986), and they were primarily distinguished by the harshness of the respective penalties. *See e.g. Kurtz v. Moffit*, 115 U.S. 487, 499 (1885). Treating misdemeanants more harshly than felons is irrational and the irrationality is "self-evident in the light of our system of jurisprudence." *See Yick Wo*, 118 U.S. at 370. Congress may not choose to invert existing state criminal law frameworks in all 50 states. The panel decision authorizes Congress to undercut what is self-evident and uniform about our legal system and bids fair to turn the commerce clause power into a general police power.

3. Controlling the Selection Criteria for State Law Enforcement Officers and Enforcing the Constraints through Criminal Penalties is not a Legitimate Governmental Purpose Under the Fifth Amendment Because it Violates the Tenth Amendment.

The premise of the FOP's Fifth Amendment challenge to the 1996 Gun Control Act amendments has always been unequal treatment of those who issue and possess non-federal, public interest firearms. The challenged amendments run afoul of the Fifth Amendment because the only rational basis identified by the panel for Congress' simultaneous amendment of 18 U.S.C. § 922(g)(9) and § 925(a)(1), is that Congress may discriminate between previously convicted domestic violence felons and previously convicted domestic violence misdemeanants for the impermissible purpose of controlling who may carry a firearm in the public interest in the several States. *See A/8-11; see Section A* herein.

C. The Court of Appeals' Determination that Congress May Compel All Non-Federal Law Enforcement Agencies to Observe a Domestic Violence Misdemeanant-Free Hiring Policy Pursuant to its Power to Regulate Commerce Conflicts with *United States v. Lopez* and Other Relevant Decisions of this Court.

The Court of Appeals concluded insertion of a "jurisdictional element" somehow transformed § 922(g)(9) from being unconstitutional on its face, to being constitutional as applied. *A/18* The Court of Appeals failed to

consider § 922(g)(9) in *pari materia* with § 925(a)(1) concluding *United States v. Bass*, 404 U.S. 336, 339, n.4 (1971) established Congress' authority to create "a qualification substantially identical to the one here". *A/19* The Court of Appeals holding cannot be squared with a plain reading of the Gun Control Act as amended nor with *Bass* or *United States v. Lopez*.

The *Bass* Court declined to reach the Second Amendment constitutional question because it reversed on a statutory construction ground. The *Bass* Court found the absence of the jurisdictional element fatal to the government's prosecution, it did not say the presence of one would have compelled the conclusion that all federal regulation of firearms is constitutional on its face. To the contrary this Court expressly left open the question "whether upon appropriate findings Congress can constitutionally punish 'mere possession' of firearms." *Bass*, 404 U.S. at 339 n.4.

The independent judicial duty to evaluate Congressional enactments for *ultra vires* action forecloses the Court of Appeals' decision to rely exclusively on the so-called jurisdictional element of § 922(g)(9) to declare the simultaneous amendment of § 922(g)(9) and § 925(a)(1) a valid exercise of the commerce clause power. *United States v. Lopez*, 514 U.S. at 563; *Alden*, 1999 U.S. LEXIS at 4419 (noting supremacy clause argument leads to question of whether law is valid exercise of national power) The Circuits have erroneously declared the question of whether Congress' has acted in an *ultra vires* manner nonjusticiable, provided the magic "jurisdictional element" is in the challenged enactment. This is an impermissible delegation to Congress to declare the extent of its own

power, the precise power rejected in *Lopez*. *See also Alden*, 1999 U.S. LEXIS 4420 ("We reject any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States.") Congress simply does not have the power to call a highly trained, sworn police officer's wholly intrastate firearm possession an interstate commercial event. Nor does Congress have the power to compel elected State officers empowered to issue firearms to refuse to arm those officers the People have chosen to be armed in their interest. Congress' commerce clause reach has exceeded its legal grasp. *See Lopez*, 514 U.S. at 564 (noting commerce clause power wanes in areas of traditional sovereignty)

CONCLUSION

The 1996 GCA amendments violate the structure of federalism by impugning the States' inviolable authority to choose the qualifications of its officers empowered to issue and receive public interest firearms. The possession or delivery of a firearm by a state officer executing state duties is not a commercial event within the purview of Congress' commerce clause authority. The inversion of every known state criminal law system to punish the misdemeanant more harshly than the felon burdens the fundamental right to possess a firearm in a bizarre and irrational manner. In the words of The Federalist, the 1996 GCA amendments are "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such." The Federalist No. 33 at 204 (A. Hamilton).

The People's right to keep and bear arms in the collective sense is a right to select the qualifications of those empowered to carry a public interest firearm in the discharge of state duties and is a fundamental aspect of the sovereignty which the People enjoyed before the ratification of the Constitution. *See e.g.* Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A Matter of Interpretation: Federal Courts and the Law 3, 43 (Amy Gutmann, ed. 1997). That right is retained today and is beyond the reach of the commerce clause power.

Respectfully submitted,

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FRATERNAL ORDER OF POLICE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 97-5304

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

173 F.3d 898; 1999 U.S. App. LEXIS 7304

April 16, 1999, Decided

PRIOR HISTORY: Appeal from the United States District Court for the District of Columbia. (No. 97cv00145).

DISPOSITION: Affirmed.

COUNSEL: Robert M. Loeb, Attorney, U.S. Department of Justice, argued the cause on rehearing for appellee. With him on the briefs were Frank W. Hunger, Assistant Attorney General, Wilma A. Lewis, U.S. Attorney, and Mark B. Stern, Attorney, U.S. Department of Justice.

William J. Friedman, IV, argued the cause and filed the answer brief on rehearing for appellant.

Donna F. Edwards was on the brief for amicus curiae The National Network to End Domestic Violence.

JUDGES: Before: Williams, Ginsburg and Randolph, Circuit Judges. Opinion for the Court filed by Circuit Judge WILLIAMS.

OPINION BY: WILLIAMS

OPINION: WILLIAMS, Circuit Judge: *In Moldea v. New York Times Co.*, 306 U.S. App. D.C. 1, 22 F.3d 310, 311

(D.C. Cir. 1994), at the outset of an opinion in which a panel on petition for rehearing abandoned its initial view, we quoted Justice Frankfurter's remark, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600, 93 L. Ed. 259, 69 S. Ct. 290 (1949) (Frankfurter, J., dissenting). It still seems good advice.

I. Background

In *Fraternal Order of Police v. United States*, 332 U.S. App. D.C. 49, 152 F.3d 998 (D.C. Cir. 1998) ("*FOP I*"), this panel addressed two provisions of the 1996 amendments to the Gun Control Act of 1968, 18 U.S.C. § 921 et seq. The first was § 922(g)(9), which adds domestic violence misdemeanants – "any person who has been convicted in any court of a misdemeanor crime of domestic violence" – to the list of those for whom it is unlawful to possess a firearm "in or affecting interstate commerce" or to receive a firearm that has been shipped in interstate or foreign commerce. Besides covering additional persons, Congress also amended a pre-existing exemption, § 925(a)(1), which nullified the Gun Control Act's disabilities for "any firearm . . . issued for the use of . . . any State or any department, agency, or political subdivision thereof"; Congress excluded the newly covered persons from the section's benefits. Thus, domestic violence misdemeanants, unique among persons forbidden to possess guns under the Act, are not allowed to possess even government-issued firearms.

The Fraternal Order of Police challenged the amendments on a variety of grounds, including the equal protection element of the Fifth Amendment's due process clause. *See Bolling v. Sharpe*, 347 U.S. 497, 500, 98 L. Ed. 884, 74 S. Ct. 693 (1954). We found such a violation, holding that the amendments failed "rational basis" review because of their harsher treatment of domestic violence misdemeanants as compared to domestic violence felons. *See* 152 F.3d at 1002-03.

The United States petitioned for rehearing on two grounds: that FOP had not properly raised an argument based on the irrationality of the relative treatment of misdemeanants and felons, and that we were incorrect to find the difference irrational. We granted the petition, and requested briefing and heard oral arguments on both points. *See Fraternal Order of Police v. United States*, 159 F.3d 1362 (1998).

We now determine that although it was likely improvident to address the felon-misdemeanant equal protection question in our original opinion, it has now become appropriate to do so. We also reverse our previous position and hold that the challenged provisions do satisfy rational basis review. This requires us to reach FOP's other arguments: that § 922(g)(9) violates due process by burdening the fundamental right to bear arms, that it is beyond Congress's power under the commerce clause, and that it violates the Tenth Amendment. We reject all these claims.

II. Waiver of the felon-misdemeanant claim.

Although the felon-misdemeanant distinction was never the focus of FOP's arguments, the Order did raise it twice in this litigation: orally before the district court at the combined summary judgment/preliminary injunction hearing and in its reply brief here. After advancing FOP's principal equal protection argument – that it was irrational to focus on domestic violence misdemeanants to the exclusion of other misdemeanants – FOP's counsel said:

> The other strangeness about it is that, if you are convicted of a felony, you are a convicted serial killer . . . you can be rearmed, or if you somehow become a police officer after your conviction, you can keep your gun, because you're a convicted felon. Fine. The exemption section still obtains with respect to felonies.
>
> So what's the rationality of, not only looking at one kind of misdemeanor instead of all violent misdemeanors, but leaving every felon able to be a law enforcement officer and carry a weapon in the public interest? I mean the States may regulate that, but the Federal government isn't.
>
> So if you looked just at the Federal enactment, it's irrational to say that convicted felons can be police officers and carry weapons, and people convicted of one kind of misdemeanor cannot.

March 7, 1997 Hr'g Tr. at 50-51. Neither the government nor the district court addressed the misdemeanant-felon distinction.

FOP's oral argument on the felon-misdemeanant distinction was enough to satisfy the general requirement that an issue on appeal be raised in the trial court. The government complains that it lost any "opportunity to make a record as to the relevant facts and legal arguments" because of FOP's timing in raising the issue below. Gov't Reh'g Br. at 4. But the government did not, as it could have, seek to submit a post-argument brief or supplemental affidavits on the felon-misdemeanant question. *See* Fed. R. Civ. P. 56(e) ("The court may permit [summary judgment] affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits."). Furthermore, the issue presented is essentially a legal one, and the government has not identified in its rehearing petition or briefs any type of factual evidence it would have introduced if given the opportunity.

In any event, the District Court for the District of Columbia regularly considers arguments raised for the first time at oral argument in deciding dispositive motions. *See Joslin Co. v. Robinson Broadcasting Corp.*, 977 F. Supp. 491, 493 (D.D.C. 1997) (motion to dismiss); *Jones v. WMATA*, 1997 U.S. Dist. LEXIS 5729, 1997 WL 198114, No. Civ. A. 95-2300-LFO, at *1 n.1 (D.D.C. April 10, 1997) (summary judgment); *Richardson v. National Rifle Ass'n*, 871 F. Supp. 499, 501 (D.D.C. 1994) (summary judgment). If the felon-misdemeanant issue had been properly briefed on appeal, it would have been proper for us to address it.

But FOP failed to raise the issue in its opening brief on appeal. Although two passages in that brief might be read in isolation as related to the felon-misdemeanant

equal protection argument, context makes clear that neither one actually did so. The first vague allusion was merely ancillary to FOP's commerce clause argument, *see* FOP Br. at 34-35, and the second, though vague, plainly related solely to FOP's claim of irrational discrimination among misdemeanants, *see* FOP Br. 39-40. Unsurprisingly, the government did not address the felon-misdemeanant distinction in its brief.

FOP's reply brief, however, did raise it, saying, albeit in the context of its commerce clause argument, that "this limited elimination of a long-standing exception is irrational. . . . Permitting a person convicted of a felony on a domestic partner to benefit from the exception but not a person convicted of a misdemeanor on a domestic partner serves no legitimate goal." FOP Reply Br. at 16.

Normally, because of the likely unfairness to parties and risk of improvident decisions, we would refuse to consider an argument that an appellant failed to raise before its reply brief. *See, e.g., Doolin Sec. Sav. Bank v. OTS*, 332 U.S. App. D.C. 189, 156 F.3d 190, 191 (D.C. Cir. 1998); *McBride v. Merrell Dow & Pharms., Inc.*, 255 U.S. App. D.C. 183, 800 F.2d 1208, 1210-11 (D.C. Cir. 1986). Here, however, the felon-misdemeanant issue was raised energetically by the court at oral argument (perhaps because, although defectively raised, it appeared comparatively straightforward), but the government, though responding on the merits, made no mention of FOP's waiver of the issue. Oral Arg. Tr. at 35-39. Accordingly, we think it was within the court's discretion to treat the government as having waived the waiver. *See United States v. Hollingsworth*, 27 F.3d 1196, 1203 (7th Cir. 1994) (en banc); *cf. Ochran v. United States*, 117 F.3d 495, 503

(11th Cir. 1997) (weighing "prejudice to the parties" and "interest of justice" in determining whether to treat government as having waived appellant's failure to raise argument below).

That of course is not to say that affirmative exercise of the discretion was wise. We have already telegraphed that with the more complete briefing we see the issue as coming out the other way. In retrospect, it may well have been imprudent to address the merits on so thin an argumentative record.

Now, however, both parties have weighed in on the issue in considerable detail. The court has worked through it not once but twice. So there is no special risk of reaching an improvident decision; and, as the government has had (and taken) the opportunity to respond, the most important respect in which reaching the issue might have been "unfair" is also absent. One might also think it "unfair" in a relevant sense to be faced with the risk of losing a case on the basis of an argument that one's adversary failed to raise in the time and space allotted. But that seems weak here, as the government shares some of the responsibility for our having missed the procedural objection initially.

Thus, there is no bar to resolving the felon-misdemeanant issue at this stage. In addition, there is an affirmative reason for doing so: judicial economy. This panel's prior opinion highlighted the felon-misdemeanant issue; it will surely be raised again soon. The costs of now going forward being modest, and the potential benefit being at least the norm for any judicial decision, it makes little sense to drop the issue.

III. The rationality of the felon/misdemeanant distinction

The analysis of standing on this issue is unchanged from our prior opinion. 152 F.3d at 1001-02. On the merits, it is plain that §§ 922(g)(9) and 925(a)(1) impose a harsher sanction on domestic violence misdemeanants than on felons. Whereas gun possession by persons convicted of a crime punishable by at least one year of imprisonment is subject to § 925(a)(1)'s exemption for government-issued firearms, gun possession by domestic violence misdemeanants is not. *See* §§ 922(g)(1) & (9), 925(a)(1).

Such domestic violence misdemeanants are not a suspect class for equal protection analysis, and we assume for the purposes of this section that the regulation does not infringe a fundamental right. (In section IV we address and reject the contention that § 922(g)(9) has been shown on this record to infringe such a right.) Thus, the classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993).

Treating misdemeanants more harshly than felons seems irrational in the conventional sense of that term. After all, "what is uniform and undisputed is that the presence of some aggravating circumstance (or perhaps the absence of a mitigating one) is necessary to establish a felony." *FOP I*, 152 F.3d at 1003. In the standard equal protection case the legislature is fully entitled to weigh one characteristic more heavily than another, even

though the balance may seem baffling to the court. But here Congress has incorporated a set of classifications made by state legislators who clearly regarded the felons' conduct as calling for greater severity than the misdemeanants' – whether because of moral opprobrium, risk to society, or whatever criteria may have guided their judgment. Yet Congress inverted this adopted classification, imposing a lesser disability on the felons, whom the state legislators had singled out for more severe treatment. Thus the usual proposition that Congress is entitled to address a problem "one step at a time" is not self-evidently applicable. *See id.*

But on reflection it appears to us not unreasonable for Congress to believe that existing laws and practices adequately deal with the problem of issuance of official firearms to felons but not to domestic violence misdemeanants – adequately at least in the sense of explaining how Congress might have found that as to felons the net benefit of federal prohibition (and non-exemption) fell below the net benefit of prohibition and non-exemption as to misdemeanants. Although state laws do not uniformly ban felons from possessing guns, as we observed in *FOP I*, *see* 152 F.3d at 1003, nonlegal restrictions such as formal and informal hiring practices may, as the government argues, prevents felons from being issued firearms covered by § 925(a)(1) in a large measure of the remaining cases. In the absence of evidence negating these propositions, they indicate that there is a reasonably "conceivable state of facts" under which it is rational to believe that the felon problem makes a weaker claim to federal involvement than the misdemeanant one. When the government is faced with a practical determination like this

one, we are obliged to accept "rough," even "illogical," solutions with an "imperfect fit between means and ends." *See Heller v. Doe*, 509 U.S. 312, 321, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993).

We note that federal criminal prohibitions in areas traditionally left to the states always entail costs – such as loss of state capacity to experiment (and of others to learn from the experiments), some atrophy of state authority, and loss of the nuance possible where regulation is by governmental institutions closer to the local scene. Thus Congress's self-limitation here may reflect a legitimate accommodation of the inherent interest in minimizing the scope of potentially intrusive federal legislation. This parallels our observation in *Blount v. SEC*, 314 U.S. App. D.C. 52, 61 F.3d 938, 946 (D.C. Cir. 1995), on the functions of underinclusiveness analysis in the First Amendment realm. It addresses whether the proffered state interest actually underlies the disputed law; once that is established, there is no occasion for any inquiry into whether some broader restriction on speech would more effectively advance the specified set of legislative aims.

We leave for another day the complex interpretive issues posed by the statutory provision relieving an offender of the disability where the underlying conviction has been expunged or set aside, or the offender pardoned, or where civil rights that have been revoked are restored. *See* 18 U.S.C. § 921(a)(33)(B)(ii); *FOP I*, 152 F.3d at 1003-04. The possible anomalies noted in our earlier opinion and in those of other courts have not been addressed in the briefs and their impact would appear to turn on a detailed analysis of applicable state law and its interaction with federal law.

Finally, we reaffirm the determination in our original opinion that a special focus on domestic violence misdemeanants, as opposed to other misdemeanants, was not irrational under the norms of equal protection jurisprudence. *See id.* at 1002-03.

IV. Other constitutional claims

A. Standing

In *FOP I* we found that FOP members who are chief law enforcement officers ("CLEOs") would have Article III standing to challenge §§ 922(g)(9) and 925(a)(1): the provisions injure the CLEOs because they prevent them from using officers affected by the ban in situations requiring firearms, and the injury is redressable by this court. *FOP I*, 152 F.3d at 1001-02. Further, FOP satisfied the standards of *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977), for Article III standing – (1) CLEOs are among FOP's members, (2) the challenge is germane to its purpose, and (3) the CLEOs' participation as individuals is not necessary for disposition of the case – at least as to those claims for which the complaining CLEOs also have prudential standing.

In *FOP I* we raised the question whether a deficiency in prudential standing on the part of members would translate, for the association, into a deficiency in Article III standing or into one in prudential standing. 152 F.3d at 1001 n.1. As we found prudential standing for the CLEOs on the equal protection claim, in the end we didn't need to resolve the issue. But the analysis we used for prudential standing for the CLEOs depended on the claim's

being one of equal protection, and so is unavailable for the issues now before us.

It is, however, permissible to reject a claim on the merits without having explicitly resolved the prudential standing issue. For one reason, as the Court has explained, overlap between the merits and prudential standing is sometimes so great as to make any distinction artificial. *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 118 S. Ct. 1003, 1013-14 n.2, 140 L. Ed. 2d 210 (1998). *See also George E. Warren Corp. v. EPA*, 164 F.3d 676 (D.C. Cir. 1999). But we may proceed along this line only if our answer to the question left open in *FOP I* is that a failure in members' prudential standing constitutes only a failure in prudential standing for the association.

As we suggested in *FOP I* would be the case, that is our answer. Cases have treated the first Washington Apple requirement (that a member have standing) as entirely constitutional, *see, e.g., United Food & Comm'l Workers v. Brown Group*, 517 U.S. 544, 554-56, 134 L. Ed. 2d 758, 116 S. Ct. 1529 (1996), but those cases did not confront the significance of a member's having constitutional but not prudential standing. Basically the first criterion appears simply to look through the associational veil to the member's interest; the second (germaneness to the association's purposes) aims at assuring proper representativeness and is thus needed to establish requisite adversariness, and the third (absence of any need to have the members before the court) meets certain convenience considerations. *Id.* Because the association functions only as a transparency in relation to the requirement of a member's standing, we think the normal (qualified) excusability of addressing prudential standing is passed

through to the association. Accordingly, we move on to the merits.

B. Merits

Substantive Due Process; Second Amendment

FOP argues that § 922(g)(9) violates the substantive due process guarantee of the Fifth Amendment by "unnecessarily and irrationally burdening important individual interests in possession of a firearm in the public interest, in serving the community, and in pursuing an established career." FOP Br. at 36. The second interest has clearly not attained the status of a fundamental right. As to the third, it is true that if government action against a particular person "precludes" him from pursuing his profession, that action can infringe a "liberty interest"; if so, the predicate procedures must satisfy due process requirements. *See Kartseva v. Department of State*, 308 U.S. App. D.C. 397, 37 F.3d 1524, 1529-30 (D.C. Cir. 1994). But FOP's claim is that § 922(g)(9) violates "substantive" due process; yet it has failed to develop either a factual record or the legal standard for evaluating whether § 922(g)(9) burdens the liberty interest so deeply as to require even justification. Accordingly we turn directly to the claim arising from the Second Amendment.

First we note that on appeal FOP also raises an independent Second Amendment claim. But as it did not do so in the district court[1] we do not address it in that

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[1] There FOP invoked the Second Amendment only as part of arguments that § 922(g)(9) violates the Tenth Amendment and the constitutional guarantees of substantive due process

form. We must confess, however, that we are mystified by the decision to advance a substantive due process claim based on an explicit Second Amendment right in preference to a simple assertion of the explicit right itself. It is not apparent how a claim might be strengthened by being tucked into the catch-all of substantive due process.

In any event, the claim obviously requires us to consider the Second Amendment right, on which the Supreme Court's guidance has been notoriously scant. The government argues that FOP's claim fails because FOP has not "alleged, much less proven, that section 922(g)(9) has any relationship to the 'preservation or efficiency of a well regulated militia.' " Gov't Br. at 35 (quoting *United States v. Miller*, 307 U.S. 174, 178, 83 L. Ed. 1206, 59 S. Ct. 816 (1939)). Since *Miller* dealt with Congress's authority to prohibit ownership of short-barreled shotguns, FOP could have challenged the test's applicability by arguing that it serves only to separate weapons covered by the amendment from uncovered weapons. It did not do so, and we thus assume the test's applicability.

But we are not altogether clear what kind of "relationship" – or, to quote *Miller* more precisely, "reasonable relationship," *id.* – is called for here. This *Miller* test appears in some sense to invert the commercial speech

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and equal protection. *See* Hearing Trans. at 47, 52 (Tenth Amendment); FOP Memo. in Support of Prel. Inj. at 15, 18 (equal protection and substantive due process); FOP Resp. and Reply at 15-16 (Tenth Amendment).

test, which requires the government to show that legislation restricting such speech bears a reasonable relationship to some "legitimate" or "substantial" goal. *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416, 123 L. Ed. 2d 99, 113 S. Ct. 1505 (1993); *Board of Trustees v. Fox*, 492 U.S. 469, 480, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989). We suppose *Miller* would be met by evidence supporting a finding that the disputed rule would materially impair the effectiveness of a militia, though perhaps some other showing could suffice. We need not fix the exact form of the required relationship, however, because FOP has presented no evidence on the matter at all.

Instead FOP simply argues that, in "most" states, police officers can be called into service as militia members. But none of the nine states' provisions it cites appears to make police officers any more susceptible to such service than ordinary citizens (or in some cases, than males between the ages of 17 and 45). In any event, § 922(g)(9) does not hinder the militia service of all police officers, only of domestic violence misdemeanants whose convictions have not been expunged, etc. FOP never indicates how restrictions on the latter, relevant class would have a material impact on the militia.

Tenth Amendment

FOP's Tenth Amendment challenge fails because § 922(g)(9) does not force state officials to do anything affirmative to implement its bar on domestic violence misdemeanants' possession of firearms. The Amendment forbids the federal government to "conscript[ ] the State's

officers" to "enforce a federal regulatory program," *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 2384, 138 L. Ed. 2d 914 (1997), but FOP has presented no evidence that § 922(g)(9) enacts any such conscription.

Although the Gun Control Act does not designate an agency responsible for enforcement of its criminal provisions, both the contentions of the parties and undisputed record evidence indicate that federal authorities, in particular the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), have such enforcement responsibility for § 922(g)(9). *See* Memo in Support of Plaintiff's Motion for a Preliminary Injunction, at 2; Gov't Br. at 33; Nicholas M. Gess, Director, Office of Intergovernmental Affairs, Department of Justice, "Memorandum for All Interested Law Enforcement Groups," Dec. 6, 1996, at 2. It is true that ATF has made suggestions to state and local law enforcement officials about how best to deal with employees newly disqualified from carrying firearms. *See*, e.g., John W. Magaw, Director, ATF, "Open Letter to All State and Local Law Enforcement Officials," Nov. 26, 1996, at 2-3. But even if these purported to require non-federal authorities to embark on active enforcement measures, they would evidently represent a transgression of the Bureau's statutory authority rather than dutiful implementation of an unconstitutional statute. In fact, however, the Open Letter does not seem to suggest even an implied claim of authority to compel local law enforcement officials to take active measures. For employees subject to the disability, it advises that "if such person refuses to relinquish the firearm . . . , and your agency is without authority to retain or seize the firearm . . . , you should contact the local ATF office." *Id.* at 3.

FOP argues that § 922(g)(9) unconstitutionally restricts states' power to determine police officers' "qualifications for office," FOP Br. at 21, by prohibiting domestic violence misdemeanants from holding law enforcement positions requiring the use of firearms. But assuming that this constitutes federal regulation of "core" areas of state sovereignty, the Supreme Court no longer reads the Tenth Amendment as forbidding such regulation, relegating to the political process the states' protection from undue intrusion in this form. *See South Carolina v. Baker*, 485 U.S. 505, 511, 99 L. Ed. 2d 592, 108 S. Ct. 1355 (1988); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-54, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985).

Even if the Tenth Amendment insulated some areas of state activity from negative federal regulation, FOP's claim would be overbroad. It may commonly be a side effect of federal prohibitions to impair offenders' fitness for service as a police officer. Showing up for work at some spot other than a federal prison is a qualification for most state positions; federal incarceration intrudes inescapably. Of course § 925(a)(1)'s exemption for state-issued weapons protects states from this sort of peripheral interference as to all persons barred by federal law from weapons possession other than domestic violence misdemeanants, but the exemption's existence does not establish it either as a constitutional right or as a baseline for measuring claims under the Tenth Amendment – or any other constitutional provision.

Commerce Clause

FOP argues that § 922(g)(9) is beyond Congress's power to enact under the commerce clause. We join all the numbered circuits[2] in rejecting this argument because § 922(g)(9) contains a "jurisdictional element": in any prosecution under the provision for possession, the government must prove that the defendant possessed the firearm "in or affecting commerce."

In *United States v. Bass*, 404 U.S. 336, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971), the Supreme Court confronted an ambiguity in a provision imposing penalties on any felon who "receives, possesses, or transports in commerce or affecting commerce . . . any firearm." The United States argued that the phrase "in commerce or affecting commerce" qualified only "transports," while the defendant contended that the commerce requirement applied to "receives" and "possesses" as well. The Court resolved the ambiguity in favor of the defendant and noted that that disposition made it unnecessary to reach the question "whether, upon appropriate findings, Congress can constitutionally punish the 'mere possession' of firearms." *Bass*, 404 U.S. at 339 n.4. Since the Court held that

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[2] *See United States v. Smith*, 101 F.3d 202, 215 (1st Cir. 1996); *United States v. Sorrentino*, 72 F.3d 294, 296 (2d Cir. 1995); *United States v. Gateward*, 84 F.3d 670, 672 (3d Cir. 1996); *United States v. Wells*, 98 F.3d 808, 811 (4th Cir. 1996); *United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996); *United States v. Turner*, 77 F.3d 887, 889 (6th Cir. 1996); *United States v. Lewis*, 100 F.3d 49, 52 (7th Cir. 1996); *United States v. Barry*, 98 F.3d 373, 378 (8th Cir. 1996); *United States v. Nguyen*, 88 F.3d 812, 820-21 (9th Cir. 1996); *United States v. Bolton*, 68 F.3d 396, 400 (10th Cir. 1995); *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996).

a qualification substantially identical to the one here made it unnecessary even to consider whether the prohibition in question exceeded Congress's power, the enactment here, as so qualified, must also fall within Congress's authority.[3] *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), does not change the impact of Bass, for in Lopez the Court explicitly noted that the law there held unconstitutional contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at 561. *See also United States v. Harrington*, 323 U.S. App. D.C. 431, 108 F.3d 1460, 1465 (D.C. Cir. 1997), in which we found that the government had presented enough evidence to satisfy the Hobbs Act provision criminalizing robbery or extortion that "obstructs, delays, or affects commerce," 18 U.S.C. § 1951(a), and made clear that satisfaction of such a requirement would bring the statute safely within the Congress's commerce clause authority.

Finally, to the extent that ATF missives on the subject may be disregarding the jurisdictional element, *see* ATF, "Misdemeanor Crime of Domestic Violence: Questions and Answers," Feb. 14, 1997, at 1 (saying that "law enforcement officers and other Government officials who have been convicted of a disqualifying misdemeanor may not lawfully possess or receive firearms or ammunition for any purpose, including performance of their official

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[3] 18 U.S.C. § 922(d)(9), barring transfer of firearms to the various proscribed persons, lacks any such explicit jurisdictional hook, but FOP has not challenged that provision, as its counsel conceded at oral argument on rehearing.

duties"), such communications pose an issue of agency excess of statutory authority, which here would be dispositive before any constitutional issue would be reached.

* * *

The district court's order granting summary judgment for the defendant is

Affirmed.

FRATERNAL ORDER OF POLICE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 97-5304

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

332 U.S. App. D.C. 49; 152 F.3d 998;
1998 U.S. App. LEXIS 21033

August 28, 1998, Decided

SUBSEQUENT HISTORY:

Rehearing Granted November 12, 1998, Reported at: 1998 U.S. App. LEXIS 31404.

PRIOR HISTORY: Appeal from the United States District Court for the District of Columbia. (No. 97cv00145).

DISPOSITION: Reversed.

COUNSEL: William J. Friedman, IV argued the cause and filed the briefs for appellant.

Robert M. Loeb, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief were Frank W. Hunger, Assistant Attorney General, Wilma A. Lewis, U.S. Attorney, and Mark B. Stern, Attorney, U.S. Department of Justice.

JUDGES: Before: WILLIAMS, GINSBURG and RANDOLPH, Circuit Judges. Opinion for the Court filed by Circuit Judge WILLIAMS.

OPINION BY: WILLIAMS

OPINION: WILLIAMS, Circuit Judge: The Fraternal Order of Police, an association of law enforcement officers, brought suit challenging certain provisions of the 1996 amendments to the Gun Control Act of 1968, 18 U.S.C. § 921 et seq. The Order alleged that these provisions exceeded Congress's power under the Commerce Clause, and also that they ran afoul of the Second, Fifth, and Tenth Amendments. The district court granted summary judgment for the government. Finding that the Order has standing to raise its claim under the equal protection component of Fifth Amendment due process, *see Bolling v. Sharpe*, 347 U.S. 497, 499, 98 L. Ed. 884, 74 S. Ct. 693 (1954), and finding merit in that claim, we reverse.

* * *

As relevant here, the essence of the 1996 amendments was to (1) extend a pre-existing criminalization of firearms possession by persons convicted of domestic violence felonies to persons convicted of domestic violence misdemeanors; and (2) to withhold from the misdemeanants – but not the felons – an exception for firearms issued for the use of any state or locality (the so-called "public interest exception"). The Gun Control Act, now as before, also applies to anyone who supplies a person with a firearm in the face of this and related proscriptions.

The amendments bringing about this change are as follows: Section 922(d)(9) of Title 18 makes it illegal to provide a firearm to any person "convicted in any court of a misdemeanor crime of domestic violence"; § 922(g)(9) prohibits such misdemeanants from possessing or receiving firearms. Section 922(g)(9) limits its scope

to possession in or affecting interstate commerce, or firearms transported in interstate commerce; § 922(d)(9) contains no similar limitation. Relief from the disability thus imposed is governed in part by § 925(a)(1), which provides that the prohibitions of § 922 generally do not apply to firearms issued for the use of "any State or any department, agency, or political subdivision thereof." Section 925(a)(1) explicitly excludes §§ 922(d)(9) and 922(g)(9) from this public interest exception.

Sections 922(d)(9) and (g)(9) thus forbid the states to arm those members of their police forces, militias, or National Guards who possess disabling misdemeanor convictions; they criminalize both the officers' acceptance of the states' firearms and the provision of the firearms by any person, including (presumably) any state's representative. The disability operates regardless of the date of the conviction. So the new bans can be expected to affect a significant number of current police officers. The Joint Appendix contains several newspaper articles recounting instances in which officers were required to turn in their guns, and it was in view of this prospect – though not solely on behalf of members directly threatened with the firearm disability – that the Order brought suit.

* * *

The threshold question on appeal is whether the Order has standing to pursue its claims. We find it necessary to address only the standing claim based on the interests of members who are chief law enforcement officers ("CLEOs"). Although the Order's briefs make vague allusions to some legal theories that would entail broader relief than is suitable for the Equal Protection claim

brought by the Order on behalf of the CLEOs, they fail to develop such theories. So there is no need to assess the standing possibly underlying such inchoate claims.

For a party to establish the sort of "case" or "controversy" over which Article III creates federal jurisdiction, it must satisfy the now familiar tripartite requirements of "(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551, 134 L. Ed. 2d 758, 116 S. Ct. 1529 (1996). An association such as the Order, which alleges no injury to itself as an organization, may, according to *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977), sue on behalf of its members if it can show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343. The first of these elements ensures the presence of a case or controversy and is constitutional in nature. *See Warth v. Seldin*, 422 U.S. 490, 511, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). It is the only one the government contests and the only one with respect to which we can see any difficulty.

Several CLEOs allege that enforcement of the 1996 amendments conflicts with their obligations under state law. Although there is no indication that this is true in the hard core sense of federal law requiring any CLEO to do something state law forbids (or vice versa), it seems true

in the broader practical sense that if a CLEO complies with the domestic violence misdemeanor provisions, he will find himself, in any enforcement activity requiring firearms, unable to use officers who fall under the federal ban, even where in his judgment it is highly desirable or even critical to use such officers. The government presents no reason to think that this interference should not qualify as an Article III injury, and we can see none.

There remains the issue of whether the CLEOs would have "prudential standing," i.e., whether the interests they seek to advance are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970).[1] As to the equal protection claim (the only claim it is necessary to reach), of course, the CLEOs are not members of the class that the statute is said to illegally disadvantage – law officers convicted of domestic violence misdemeanors, who are barred from the benefits of the public interest exception

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[1] Whether a prudential defect in a member's standing translates to a constitutional defect in the association's is a nice question. Superficially, one might conclude that it would, since the cases treat the first element of the Washington Apple test as (entirely) constitutional. *See, e.g., United Food and Commercial Workers*, 517 U.S. 544 at 554-55, 134 L. Ed. 2d 758, 116 S. Ct. 1529. But since this constitutional character stems from the case or controversy requirement, *see id.*, and prudential defects do not affect the existence of a case or controversy, it seems more likely that a member's lack of prudential standing translates to a similar prudential failing for the association.

(as opposed to law officers convicted of domestic violence felonies, who are not). But where a person is effectively used by the government to implement a discriminatory scheme, he may, as we held in *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 350 (D.C. Cir. 1998), "attack that scheme by raising a third party's constitutional rights." There we followed *Barrows v. Jackson*, 346 U.S. 249, 259, 97 L. Ed. 1586, 73 S. Ct. 1031 (1953), which allowed a white homeowner to invoke the equal protection rights of non-Caucasian third parties in resisting the petitioner's effort to enforce a racially restrictive covenant, and *Craig v. Boren*, 429 U.S. 190, 194-97, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976), which allowed a licensed beer vendor to invoke the equal protection claims of males aged 18 to 21 who were barred from beer purchase by a statute that allowed purchases by females of that age.

Although neither Barrows nor Craig is crystal clear as to just when a person whose injury qualifies under Article III may invoke the interests of a third party, the Court in Craig seemed to embrace the proposition asserted in a student law review note, namely, that he should be able to assert those third-party rights that would be infringed by his compliance. *See* 429 U.S. at 195, citing Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 432 (1974). As any CLEO who gave a firearm to a law enforcement officer who had been convicted of a domestic violence misdemeanor would be liable himself under § 922(d)(9), his compliance (i.e., not supplying the officer with the gun) would indeed defeat the right-holder's interest. Thus CLEOs have standing to assert the equal protection rights of police officers –

members or not – threatened with deprivation of their firearms; the presence of CLEOs as members gives the Order standing to makes these claims as well.

* * *

Equal protection analysis is substantially identical under the Fifth Amendment and the Fourteenth. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995). Usually the outcome turns largely on the level of scrutiny to be applied. If a law neither burdens a fundamental right nor targets a suspect class, courts must uphold the legislative classification so long as it bears a rational relation to some legitimate end. *See, e.g., Heller v. Doe*, 509 U.S. 312, 319, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993). Laws that fall into either of the above categories, however, are subjected to strict scrutiny. *See, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-40, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985) (discussing tiers of scrutiny). The Order concedes that persons convicted of domestic violence misdemeanors are not a suspect class but asserts that the 1996 amendments impinge on a fundamental right – the right to bear arms guaranteed by the Second Amendment. The government responds that the Second Amendment right does not belong to individuals, but exists only in relation to "the preservation or efficiency of a well regulated militia," *United States v. Miller*, 307 U.S. 174, 178, 83 L. Ed. 1206, 59 S. Ct. 816 (1939), and that the 1996 amendments do not restrict state militias.

Analysis of the character of the Second Amendment right has recently burgeoned. *See, e.g.*, Akhil Reed Amar, The Bill of Rights 257-67 (1998); David C. Williams, Civic

Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 Yale L.J. 551, 572-86 (1991); compare *Hickman v. Block*, 81 F.3d 98, 101-03 (9th Cir. 1996), with *United States v. Gomez*, 92 F.3d 770, 774 n.7 (9th Cir. 1996). Despite the intriguing questions raised, we will not attempt to resolve the status of the Second Amendment right, for we find that the 1996 amendments fall into the narrow class of provisions that fail even the most permissive, "rational basis," review. *See, e.g., City of Cleburne*, 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249.

Section 925 extends the "public interest" exception to all sources of the firearm disability except domestic violence misdemeanors. It thus allows the states to arm police officers convicted of violent felonies, and even crimes of domestic violence so long as those crimes are felonies, while withholding this privilege with respect to domestic violence misdemeanors. No reason is offered for imposing the heavier disability on the lighter offense. The government's brief argues that a special focus on domestic violence as compared to other misdemeanors is rational, and we agree. The defect is the neglect of more severe crimes of domestic violence, about which the government says nothing.

A conceivable justification comes to mind. As a law survives rational basis review if it is rational under any "reasonably conceivable state of facts," *Heller v. Doe*, 509 U.S. 312, 320, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993) (citation omitted), we address this despite the government's having failed to mention it. Most states appear to bar convicted felons from possessing guns. *See, e.g.*, Cal. Penal Code § 12021(a)(1) (felon's possession of firearm is felony); North Carolina Stat. § 14-415.1 (same) Oklahoma

Stat. Title 21 § 1283 (same); Rhode Island Gen. Laws § 11-47-5 (same); Texas Penal Code § 46.04 (same); Wisconsin Stat. § 941.29 (same); Wyoming Stat. § 6-8-102 (same). Few – perhaps only New York – provide any public interest exception. *See* N.Y. Penal L. § 265.20 (exempting New York military, police officers, and peace officers). The government might therefore argue that federal law has stepped in merely to fill a practical gap: concluding that all persons guilty of domestic violence should be barred from possession of firearms, without regard to public interest, but noting that the states have satisfactorily addressed the issue except for the misdemeanor offender, Congress has taken care of this neglected problem. But this analysis would allow a rougher notion of justice than even "rational basis" review allows.

The problem is that the states' laws are neither sufficiently consistent, nor sufficiently severe, to make this a rational approach. New Hampshire, for example, requires three felonies for the prohibition to attach. *See* N.H. Stat. Title XII § 159:3-a. Vermont does not prohibit gun possession by felons who are convicted but never incarcerated. *McGrath v. United States*, 60 F.3d 1005, 1007 (2d Cir. 1995). As we have noted, at least New York seems to offer a public interest exception. And while the laws of most states do bar felons from possessing firearms even in the public interest, many states have disabilities of limited duration, and the duration varies from state to state. *See, e.g.*, Maine Rev. Stat. Title 15 § 393 (application for permit allowed after five years); North Dakota Stat. § 62.1-02-01 (ten years); South Dakota Stat. § 22-14-15 (fifteen years). Once these periods have expired, firearm rights are

restored. The resulting anomalies flow well beyond those normally arising from federalism. The worse offenders may enjoy some restoration of lost rights under state law, while the lesser face an implacable bar.

The government notes, following up its point that Congress may distinguish between crimes of domestic and violence and other crimes, that a legislature does not violate the equal protection clause merely because it approaches an issue "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489, 99 L. Ed. 563, 75 S. Ct. 461 (1955). But this aspect of equal protection law is of little help for Congress's decision to impose a more severe regime on domestic violence misdemeanants than on domestic violence felons. Whatever precise elements may influence a state's classification of offenses between those two categories, what is uniform and undisputed is that the presence of some aggravating circumstance (or perhaps the absence of a mitigating one) is necessary to establish a felony. Of course Congress may take "one step at a time." But here, while incorporating state law (and judgments thereunder) into its scheme, it has stepped most harshly on those persons the states have systematically deemed less culpable.

We note, finally, that the treatment of domestic violence misdemeanants intersects with certain anomalies in Congress's provision for deferring to state law on restoration of civil rights. For the purposes of the firearm disability generally, 18 U.S.C. § 921(a)(20) provides that convictions for which civil rights have been restored do not trigger the disability. *See United States v. Bost*, 318 U.S.

App. D.C. 324, 87 F.3d 1333, 1335 (D.C. Cir. 1996) (discussing state restoration of rights). An equivalent provision, § 921(a)(33)(B)(ii), allows state restoration of civil rights to lift the federal disability from domestic violence misdemeanants. But few states (if any) deprive such misdemeanants of civil rights. With no deprivation, there can be no "restoration" in the ordinary sense of the term. *See McGrath*, 60 F.3d at 1007-10 (holding that felon whose civil rights were not revoked could not argue that they had been restored). Thus the plain text of the statute seems to put misdemeanants who have never lost their rights in a worse situation than felons whose rights are restored, often by automatic operation of state law. *See, e.g., United States v. Caron*, 77 F.3d 1, 2-4 (1st Cir. 1996) (holding that individualized restoration of civil rights is not required to lift firearm disability).

This anomalous consequence of the "civil rights restored" provision is not confined to domestic violence misdemeanors. Any conviction that triggers the disability but does not deprive the convict of civil rights will produce a similar result. Thus misdemeanors carrying a sentence of more than two years (which count as qualifying convictions under § 921(a)(20)), or felonies not accompanied by revocation of civil rights, will also activate the federal disability with no prospect of relief via restoration of civil rights.

The First Circuit has responded to this discrepancy by holding that the "civil rights restored" provision of § 921(a)(20) protects those who have never been deprived of civil rights. *See United States v. Indelicato*, 97 F.3d 627, 630-31 (1st Cir. 1996). That case involved a person convicted of a misdemeanor for which state law provided a

maximum term of two and a half years, i.e., a felony for purposes of § 921(a)(20). But its reasoning applies to § 921(a)(33)(B)(ii) equally, and in that context cuts much more deeply. So far as we know, no state responds to a domestic violence misdemeanor conviction by revoking the right to vote, hold office, or serve on a jury. (These are the civil rights on which the statute focuses. *See Bost*, 87 F.3d at 1335.) If failure to revoke is treated as restoration, then §§ 922(g)(9) and (d)(9) become entirely without effect: no conviction for a domestic violence misdemeanor would trigger the federal disability, since no such misdemeanor would qualify under § 921(a)(33). On the other hand, if the absence of any initial deprivation renders the restoration provisions inapplicable, then § 921(a)(33)(B)(ii), expressly inserted to provide for restoration in the case of domestic violence misdemeanors, is itself without effect. Because we find §§ 922(g)(9) and (d)(9) in violation of equal protection requirements independently, we need not address the interpretive and other issues posed by the "restoration" provisions.

* * *

This brings us to the question of remedy. The Order makes various alternative requests, one of which is that we hold § 925 inoperative. Section 928 of the Gun Control Act explicitly provides that the invalidation of one provision shall not affect the remainder of the Act. We think the most appropriate remedy is consequently to hold that § 925 is unconstitutional insofar as it purports to withhold the public interest exception from those convicted of domestic violence misdemeanors. The government may not bar such people from possessing firearms in the public interest while it imposes a lesser restriction on those

convicted of crimes that differ only in being more serious. Of course we do not decide whether a broader revocation of the public interest exception – for example, from all those convicted of any crime of domestic violence – would be constitutional.

So ordered.

THE FRATERNAL ORDER OF POLICE, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

Civil Action No. 97-0145 (JR)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

981 F. Supp. 1; 1997 U.S. Dist. LEXIS 16651

October 2, 1997, Filed

DISPOSITION: Plaintiff's motion for preliminary injunction denied. Defendant's motion for summary judgment granted.

COUNSEL: Ellen Efros, Tim McGarey, Vorys, Sater, Seymour and Pease, Washington, DC, for Plaintiff.

William J. Friedman, Santa Fe, NM, for Plaintiff.

Mr. Mark Sitcov, Ms. Andrea Newark, U.S. Department of Justice, Washington, DC, for Defendant.

JUDGES: JAMES ROBERTSON, United States District Judge.

OPINION BY: JAMES ROBERTSON

OPINION: MEMORANDUM OPINION

A 1996 amendment to the Gun Control Act of 1968 makes it illegal for any person "convicted in any court of a misdemeanor crime of domestic violence" to ship, receive or possess firearms or ammunition that affect interstate commerce. 18 U.S.C. § 922(g)(9). Unlike all other firearm disabilities in 18 U.S.C. § 922(g), the 1996 amendment applies to law enforcement officers. 18 U.S.C. § 925(a)(1).

This action by the Fraternal Order of Police ("FOP"), an association of law enforcement officers, asserts that the new law exceeds Congress' legislative power under the Commerce Clause and the Tenth Amendment and that it violates the Due Process Clause of the Fifth Amendment.[1] The claims that remain viable after the Supreme Court's decision in *Printz v. United States*, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997),[2] deal with the provision of the new law that prohibits possession of firearms by persons convicted of domestic violence misdemeanors, 18 U.S.C. § 922(g)(9).

Before the court are plaintiff's motion for a preliminary injunction and defendant's motion for dismissal or summary judgment. Defendant's motion will be granted because, although plaintiff does have standing, it has not stated claims for which relief can be granted.

1. Standing

An association may sue on behalf of its members if it demonstrates that: (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) the claims asserted and the relief requested

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[1] The challenge is stated in Equal Protection Clause parlance, but of course it actually lies under the Due Process Clause. *See* part 2b infra.

[2] The complaint in this action also challenged the sections of the law requiring state agents, such as chief law enforcement officers (CLEOs) to expand the scope of background checks undertaken before firearms are transferred. 18 U.S.C. § 922(g)(2). Printz invalidated those requirements.

do not require the participation of individual members in the lawsuit. *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 134 L. Ed. 2d 758, 116 S. Ct. 1529, 1534 (1996). Plaintiff easily satisfies the second and third elements: FOP lists the promotion of its members' legal interests among its purposes (including law enforcement officers), and no single member of FOP is irreplaceable in the litigation. *See* Plaintiff's Motion for Preliminary Injunction at Exhibit 4; Plaintiff's Opposition to the Motion to Dismiss at Exhibits 1-5. The first element – that some FOP members must have standing in their own right – requires further analysis.

Plaintiff has filed the affidavits of two FOP members who are law enforcement officers and have been convicted of domestic violence misdemeanors. Plaintiff alleges that the threatened application of 18 U.S.C. § 922(g)(9) has injured and, unless enjoined, will continue to injure those individuals and other member law enforcement officers by infringing on their constitutional rights to possess firearms, impeding their ability to serve as law enforcement officers, diminishing their job-related responsibilities, and resulting, for some of them, in termination of their employment. Complaint at ¶ 25.

Pre-enforcement constitutional challenges of criminal statutes are most frequently allowed when the threat of criminal prosecution against a complainant is "genuine and imminent." *Navegar, Inc. v. United States*, 322 U.S. App. D.C. 288, 103 F.3d 994, 1001 (D.C. Cir. 1997). FOP acknowledges that no specific threat of prosecution has been made against its members. FOP does assert, however, that members who have been convicted of domestic violence misdemeanors have been injured by adverse

administrative actions taken by local and state law enforcement agencies attempting to comply with the new law. Officers Fidel Ortega and Dennis Meerdter have had their firearms taken from them and have been reassigned to positions of lesser responsibility or put on leave, and they have been unable to work in off-duty security jobs. Officer Ortega states further that lawful possession of a firearm is a prerequisite for all the available positions in his police department, and that he faces termination when his leave expires. Plaintiff's Opposition to Motion to Dismiss, Exhibit 1, ¶¶ 16, 21. The uncontroverted affidavits establish injury that is sufficiently concrete and imminent to confer standing on Officers Ortega and Meerdter, if the injury is "fairly traceable" to the government's action.

"Traceability" can be refuted when the injury which allegedly confers standing results from "unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (quoting ASARCO). Courts have thus refused to find a causal link between an injury and government action where the injury is potentially attributable to a myriad of sources. *See, e.g., San Diego Co. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) (no cognizable economic injury to gun manufacturers because other forces acting in the market had affected the prices, making it impossible to conclude that the passage of a statute had caused the injurious price increase). This case does not present

that situation, however. Local and state law enforcement agencies do not have "unfettered choices" or "legitimate discretion" to flout a federal statute by hiring, or continuing to employ, officers whose possession of firearms is a crime.

As for defendant's argument that the new law would not apply to Ortega and Meerdter because their misdemeanor convictions have been dismissed or expunged, 18 U.S.C. § 921(a)(33)(B)(ii), the affidavits, Plaintiff's Opposition to the Motion to Dismiss at Exhibit 1, ¶ 13 & Exhibit 2, ¶ 12, refute the point. A fair reading of Officer Ortega's affidavit recites his belief in 1975 that the charge had been "dismissed," but states that he has since learned that it still exists for purposes of the new federal law. Officer Meerdter states that he has taken steps to expunge his conviction from his record, but that has been told by his employer that a recent court action was "insufficient" to exclude him from the new law's coverage.

Because Ortega and Meerdter would have standing to sue, FOP has standing.

2. Merits

a. Commerce Clause

Plaintiff asserts that § 922(g)(9) is unconstitutional on its face – that Congress does not have the authority under the Commerce Clause to punish the possession of firearms by convicted misdemeanants. The Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), does not support – and indeed its rationale defeats – that assertion. Lopez

invalidated a portion of the Gun Free School Zones Act that made it unlawful "for any individual knowingly to possess a firearm at a place that the individual knows, or has reason to believe, is a school zone." The Court observed that the statute "contained no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at 561.

The statute in this case contains just such a jurisdictional element. 18 U.S.C. § 922(g)(9) makes it unlawful for persons "who have been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearms or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." (emphasis added). *See United States v. Nguyen*, 88 F.3d 812, 820-21 (9th Cir. 1996) (holding that the felon in possession law, § 922(g)(1), is constitutional); *see also United States v. Smith*, 101 F.3d 202, 215 (1st Cir. 1996); *United States v. Lewis*, 100 F.3d 49, 51 (7th Cir. 1996); *United States v. Wells*, 98 F.3d 808, 811 (4th Cir. 1996) (collecting cases); *United States v. Barry*, 98 F.3d 373, 378 (8th Cir. 1996); *United States v. Sanders*, 97 F.3d 856, 862 (6th Cir. 1996); *United States v. Garcia*, 94 F.3d 57, 64 (2d Cir. 1996). Plaintiff's constitutional challenge based on the Commerce Clause must be rejected.

b. Due Process Clause

Plaintiff maintains that Section 922(g)(9) violates the Due Process Clause by (1) infringing upon members'

rights to possess firearms, (2) irrationally targeting a single class of misdemeanants who had committed crimes of violence, and (3) discriminating against law enforcement officers who have been convicted of misdemeanors of domestic violence. *See Vance v. Bradley*, 440 U.S. 93, 94 n.1, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979) ("Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws.")

(1) A statute challenged under the equal protection clause receives rational basis review unless the statute infringes on the exercise of a fundamental right or operates to the disadvantage a suspect class. *See, e.g., Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976); *Association of Civilian Technicians v. FLRA*, 244 U.S. App. D.C. 151, 756 F.2d 172, 177 (D.C. Cir. 1985). Plaintiff concedes that there is no suspect class at issue here, but maintains that the right to possess firearms is fundamental for equal protection purposes. There is no constitutionally protected right to keep and bear a firearm, however, that does not have "some reasonable relationship to the preservation or efficiency of a well regulated militia." *United States v. Miller*, 307 U.S. 174, 178, 83 L. Ed. 1206, 59 S. Ct. 816 (1939); *see also Lewis v. United States*, 445 U.S. 55, 65 n.8, 63 L. Ed. 2d 198, 100 S. Ct. 915 (1980) (restriction on possession of firearms by felon does not "trench upon any constitutionally protected liberties"); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (holding that § 922(g) does not violate the Second Amendment). Plaintiff has not alleged, much less proven, that § 922(g)(9) has any relationship to the "preservation and efficiency of a well-regulated militia." No fundamental right is implicated by the new law.

(2) Plaintiff argues next that imposing a firearm disability only on those who have committed domestic violence gives irrationally preferential treatment to people who have been convicted of other types of violent misdemeanors. Section 922(g)(9) must be upheld if the classification it establishes is "rationally related to achievement of a legitimate governmental interest," *Department of Agriculture v. Moreno*, 413 U.S. 528, 533, 37 L. Ed. 2d 782, 93 S. Ct. 2821 (1973), and statutory classifications are presumptively valid. *See Lyng v. Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers*, 485 U.S. 360, 370, 99 L. Ed. 2d 380, 108 S. Ct. 1184 (1988). The equal protection clause requires only a "reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993). Like other gun control provisions, the purpose of § 922(g)(9) is "keeping firearms out of the hands of categories of potentially irresponsible persons. . . . " *Barrett v. United States*, 423 U.S. 212, 220-21, 46 L. Ed. 2d 450, 96 S. Ct. 498 (1976). The state of facts which provides a rational basis for the classification at issue here is not only "reasonably conceivable" but was identified in the Senate: The sponsor of Section 922(g)(9), Senator Frank Lautenberg, observed that a person "who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk." 142 Cong. Rec. S11227 (daily ed. Sept. 30, 1996). Indeed, Senator Lautenberg cited a study which concluded that "in households with a history of battery, the presence of a gun increases the likelihood that a woman will be killed

threefold." 142 Cong. Rec. S11227 (daily ed. Sept. 25, 1996).

(3) Plaintiff goes on to argue that the statute disproportionately affects law enforcement officers who may be required to carry firearms as a condition of their employment. The disparate impact of a facially neutral law is of no constitutional significance unless the uneven effect is traced to a discriminatory purpose. *See Personnel Admin. of Massachusetts v. Feeney*, 442 U.S. 256, 272, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979) ("when the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern"); *see also Washington v. Davis*, 426 U.S. 229, 240-41, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976). Because no discriminatory purpose has been alleged in this case, this claim must fail.

Section 922(g)(9) does not violate the Due Process Clause.

c. Tenth Amendment

The Supreme Court has explained that "if a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States. . . . " *New York v. United States*, 505 U.S. 144, 156, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992). Thus, the exercise by Congress of a power delegated to it by the Constitution does not violate the Tenth Amendment, and the conclusion that the 1996 amendment to the Gun Control Act is a valid exercise of the Commerce Clause, *supra*, disposes of plaintiff's Tenth Amendment

claim. *See United States v. Collins*, 61 F.3d 1379, 1384 (9th Cir. 1995).

Plaintiff maintains, however, that the potential effects of the statute violate the Tenth Amendment – that, in passing § 922(g)(9), Congress made "all the policy decisions for the States including determining [sic] the substantive criminal law by defining the offense, naming the punishment and the collateral firearm disability, defined [sic] the exceptions and commanded [sic] State and local officials to implement, enforce and pay for its choices." Pl. Mot. for Prelim. Inj. at 5.

That argument goes far beyond the Supreme Court's decision in *Printz v. United States, supra*, and misconstrues *New York v. United States, supra*. In the *New York* case, the Supreme Court struck down legislation that required states either to enact legislation providing for the disposal of radioactive waste generated within their borders, or to take title to such waste. *Id.* at 175-77. The statute was not constitutionally permissible because it directly required action on the part of the States. In contrast, § 922(g)(9) places no requirements on States or state officials. Congress has not compelled state regulation where "any burden caused by a State's refusal to regulate will fall on [individuals], rather than on the State as a sovereign." *Id.* at 174. The Tenth Amendment is not implicated by the new law, except to the extent that its purported requirements of CLEO's have already been invalidated by Printz.

For all the reasons explained above, plaintiff's motion for a preliminary injunction must be denied, and defendant's motion to dismiss, treated as a motion for

summary judgment pursuant to F.R.Civ.P. 12(b), will be granted. An appropriate order accompanies this opinion.

JAMES ROBERTSON

United States District Judge

Dated: October 2, 1997

ORDER

For the reasons set forth in the Memorandum Opinion issued today, it is this 2d day of October, 1997,

ORDERED that plaintiff's motion for preliminary injunction is denied. And it is

FURTHER ORDERED that defendant's motion for summary judgment is granted.

JAMES ROBERTSON

United States District Judge

Fraternal Order of Police, Appellant

v.

United States of America, Appellee

No. 97-5304

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

159 F.3d 1362; 1998 U.S. App. LEXIS 31404

November 12, 1998, Filed

PRIOR HISTORY:

97cv00145.

Original Opinion of August 28, 1998, Reported at: 1998 U.S. App. LEXIS 21033.

JUDGES: BEFORE: Williams, Ginsburg and Randolph, Circuit Judges.

OPINION: ORDER

The United States's petition for rehearing is granted. Briefs should be filed according to the schedule below and should address (1) whether it is proper for the court to consider, as part of an equal protection challenge, a form of discrimination (between domestic violence misdemeanants and domestic violence felons) not explicitly asserted in the trial court or in counsel's briefs on appeal, when the issue was raised in oral argument and, although it had an opportunity to do so, the government did not claim that appellant's omission had waived the issue; (2) the merits of the equal protection challenge in that form.

The briefs should be filed as follows:

United States's opening brief (3,750 words maximum), due November 27, 1998

Appellant's response (3,750 words maximum), due December 11, 1998

United States's Reply (1,875 words maximum), due December 28, 1998

Oral argument will be heard on January 12, 1999. The parties will be advised at a later date of the time and location of the argument.

Per Curiam

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 44. FIREARMS

18 USCS § 921 (1997)

§ 921. Definitions

(a) As used in this chapter [18 USCS §§ 921 et seq.] –

* * *

(32) The term "intimate partner" means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.

(33)(A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that –

(i) is a misdemeanor under Federal or State law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B)(i) A person shall not be considered to have been convicted of such an offense for

purposes of this chapter [18 USCS §§ 921 et seq.], unless –

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii)A person shall not be considered to have been convicted of such an offense for purposes of this chapter [18 USCS §§ 921 et seq.] if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

* * *

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 44. FIREARMS
18 USCS § 922 (1999)

§ 922. Unlawful acts

* * *

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person –

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

* * *

(g) It shall be unlawful for any person –

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * *

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 44. FIREARMS
18 USCS § 925 (1999)

§ 925. Exceptions: Relief from disabilities

(a)(1) The provisions of this chapter [18 USCS §§ 921 et seq.], except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

* * *

UNITED STATES CONSTITUTION

ARTICLE 1

Section 8. **The Congress shall have power to** lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

* * *

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

AMENDMENT TWO

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

AMENDMENT FIVE

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT TEN

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[LOGO]

DIRECTOR

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, D.C. 20226

NOV. 26, 1996

OPEN LETTER TO ALL STATE AND LOCAL LAW ENFORCEMENT OFFICIALS

The purpose of this letter is to provide information to all State and local law enforcement agencies regarding one specific aspect of the recently enacted Omnibus Consolidated Appropriations Act of 1997 (the Act). One part of the Act amended the Gun Control Act of 1968 (GCA) to make it unlawful for any person convicted of a "misdemeanor crime of domestic violence" to ship, transport, possess, or receive firearms or ammunition. It also makes it unlawful for any person to sell or otherwise dispose of a firearm or ammunition to any person knowing or having reasonable cause to believe that the recipient has been convicted of such a misdemeanor. This new prohibition *does* apply to all law enforcement officers.

Act adds new firearms disability

As defined in the GCA, a "misdemeanor crime of domestic violence" means an offense that:

(1) is a misdemeanor under Federal or State law; and

(2) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian

> of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person, similarly situated to a spouse, parent, or guardian of the victim.

The definition includes all misdemeanors that involve the use or attempted use of physical force (*e.g.*, simple assault, assault and battery) if the offense is committed by one of the defined parties. This is true whether or not the State statute or local ordinance specifically defines the offense as a domestic violence misdemeanor. for example, a person convicted of misdemeanor assault against his or her spouse would be prohibited from receiving or possessing firearms or ammunition. Moreover, the prohibition applies to persons convicted of such misdemeanors at any time, even if the conviction occurred prior to the new law's effective date, September 30, 1996. As of the effective date of the new law, such a person may no longer possess a firearm or ammunition. However, with respect to all persons, a conviction would not be disabling if it has been expunged, set aside, pardoned, or the person has had his or her civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) *AND* the person is not otherwise prohibited from possessing firearms or ammunition.

New disability applies to law enforcement officers

In addition, the Act amended the GCA so that employees of government agencies convicted of qualifying misdemeanors would *not* be exempt from this new disability

with respect to their receipt or possession of firearms or ammunition. Thus, law enforcement officers and other government officials who have been convicted of a qualifying misdemeanor will not be able to lawfully possess or receive firearms or ammunition for any purpose, including performing their official duties. This disability applies to firearms and ammunition issued by government agencies, firearms and ammunition purchased by officials for use in performing their official duties, and personal firearms and ammunition possessed by such officials.

In view of this amendment's effect on law enforcement officers, your department may want to determine if any employee who is authorized to carry a firearm is subject to this disability and what appropriate action should be taken. Employees subject to this disability must immediately dispose of all firearms and ammunition in their possession. The continued possession of firearms and ammunition by persons under this disability is a violation of law and may subject the possessor to criminal penalties. In addition, such firearms and ammunition are subject to seizure and forfeiture.

In cases where your agency becomes aware of individuals subject to this disability, we recommend that such persons be encouraged to relinquish all firearms and ammunition in their possession immediately to a third party, such as their attorney, their local police agency, or a firearms dealer.

If such person refused to relinquish the firearm or ammunition, and your agency is without authority to retain or

seize the firearm or ammunition, you should contact the local ATF office.

Brady Act

In the so-called "Brady States" Chief Law Enforcement Officers (CLEOs) "shall make a reasonable effort" to determine whether a prospective buyer's receipt of a handgun would be in violation of the law. CLEOs have five business days in which to make that reasonable effort. What constitutes a "reasonable effort" is to be determined by each law enforcement agency based on its own circumstances, *e.g.*, the availability of resources, access to records, and the law enforcement priorities of the jurisdiction.

This "reasonable effort" standard is not altered by the addition of this new disqualifying category. It remains fully within the discretion of the CLEO to determine what effort is reasonable. For example, even if the CLEO determines that a misdemeanor assault conviction has occurred, it remains fully within the CLEO's discretion to determine whether to make further inquiry.

ATF forms are being revised to reflect the new category of prohibited persons.

If you have any questions concerning these new provisions, contact your local ATF office or the Firearms and Explosives Regulatory Division at 202-927-8300.

/s/ John W. Magaw
John W. Magaw
Director

QUESTIONS AND ANSWERS REGARDING MISDEMEANOR CRIME OF DOMESTIC VIOLENCE

Q. X was convicted of misdemeanor assault on October 10, 1996. The crime of assault does not make specific mention of domestic violence but the criminal complaint reflects that he assaulted his wife. May X still possess firearms and ammunition?

A. No. X may no longer possess firearms or ammunition.

Q. X was convicted of the same crime on September 20, 1996, 10 days before the effective date of the new statute. He possesses a firearm on October 10, 1996. May X lawfully possess firearms?

A. No. If a person was convicted of the crime at any time, he or she may not lawfully possess firearms or ammunition on or after September 30, 1996.

Q. Officer C was charged with felony assault on her child in 1989. She pled guilty to a misdemeanor and the felony charge was dismissed. She was suspended from the police force and ordered to undergo counseling. After successful completion of the counseling, she was reinstated. May Officer C lawfully possess firearms or ammunition?

A. No. Officer C. may no longer lawfully possess firearms or ammunition either on or off duty.

Note: For one who has been convicted of a misdemeanor crime of domestic violence, the prohibition on the possession of firearms and ammunition does not apply if the individual has received a pardon for the crime, the conviction has been expunged or set-aside, or the person has

had civil rights restored (if there was a loss of civil rights) AND the person is not otherwise prohibited from possession firearms or ammunition.

Supreme Court, U.S.
FILED
SEP 2 1999
CLERK

No. 99-106

In the Supreme Court of the United States

FRATERNAL ORDER OF POLICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In 1996, Congress amended the Gun Control Act of 1968 to bar persons convicted of a misdemeanor crime of domestic violence from possessing a firearm that has traveled through interstate commerce. See 18 U.S.C. 922(g)(9) (Supp. III 1997). The questions presented are as follows:

1. Whether the application of Section 922(g)(9) to state and local employees who would otherwise carry firearms in the performance of their duties violates the Tenth Amendment.

2. Whether Section 922(g)(9) is subject to strict scrutiny because it affects the possession of firearms.

3. Whether Congress could rationally prohibit persons convicted of domestic violence misdemeanors from possessing firearms issued for use in government employment, when it did not impose a similar prohibition with respect to domestic violence felons.

4. Whether Congress acted within its Commerce Clause powers in enacting Section 922(g)(9).

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In the Supreme Court of the United States

No. 99-106

FRATERNAL ORDER OF POLICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals upon panel rehearing (Pet. App. 1-20) is reported at 173 F.3d 898. The order of the court of appeals granting the government's petition for rehearing (Pet. App. 45-46) is reported at 159 F.3d 1362. The original opinion of the court of appeals (Pet. App. 21-33) is reported at 152 F.3d 998. The opinion of the district court (Pet. App. 34-44) is reported at 981 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals upon rehearing was entered on April 16, 1999. The petition for a writ of certiorari was filed on July 14, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1216, prohibits specified classes of persons from possessing firearms "in or affecting commerce." 18 U.S.C. 922(g) (1994 & Supp. III 1997). Those classes include, *inter alia*, felons, fugitives, illegal aliens, and persons committed to a mental institution. See 18 U.S.C. 922(g)(1)-(8) (1994 & Supp. III 1997). The prohibitions contained in Section 922(g)(1)-(8) are inapplicable to firearms "issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof." 18 U.S.C. 925(a)(1) (Supp. III 1997).

In 1996, Congress amended the Gun Control Act to bar the possession of firearms by any person convicted of a misdemeanor crime of domestic violence. See 18 U.S.C. 922(g)(9) (Supp. III 1997).[1] Unlike the other prohibitions set forth in Section 922(g), Section 922(g)(9) applies to firearms issued by federal, state, and local governments. 18 U.S.C. 925(a)(1) (Supp. III 1997).

2. This case involves a challenge to the constitutionality of Section 922(g)(9) brought by petitioner Fraternal Order of Police (FOP), an association of law enforcement officers. Petitioner contended that Section 922(g)(9) exceeds Congress's power under the Commerce Clause and violates the Tenth Amendment. Petitioner further argued that the provision violates the due process and equal protection rights of petitioner's members.

---

[1] Section 922(g)(9) does not apply to an individual whose conviction has been set aside or expunged, or who has been pardoned or has had his civil rights restored. See 18 U.S.C. 921(a)(33)(B)(ii) (Supp. III 1997).

The district court rejected petitioner's constitutional claims and granted summary judgment in favor of the United States. Pet. App. 34-44. The court held that Section 922(g)(9) is a permissible exercise of congressional power under the Commerce Clause. *Id.* at 38-39. The court also held that petitioner's due process and equal protection arguments are without merit. *Id.* at 39-42. The court found that, because no fundamental right or suspect class is at issue, the statute is subject to rational basis review. *Id.* at 40. Citing evidence in the legislative record showing that the presence of a gun during a domestic dispute substantially increases the likelihood that a victim will be killed, the court found that the statute survives rational basis review. *Id.* at 41-42. The court also rejected petitioner's argument that the statute disproportionately affects law enforcement officers, holding that the "disparate impact of a facially neutral law is of no constitutional significance unless the uneven effect is traced to a discriminatory purpose." *Id.* at 42.

Finally, the district court held that Section 922(g)(9) does not violate the Tenth Amendment. Because Section 922(g)(9) "places no requirements on States or state officials," the court explained, "[t]he Tenth Amendment is not implicated by the new law." Pet. App. 43.

3. The court of appeals initially reversed the judgment of the district court. Pet. App. 21-33. The court held that petitioner had standing to sue as the representative of members who are chief law enforcement officers (CLEOs). *Id.* at 23-27. On the merits, the court agreed with the United States that Congress's "special focus on domestic violence as compared to other misdemeanors [wa]s rational." *Id.* at 28. The court held, however, that the statutory scheme is

irrational because it permits gun possession by a police officer who has been convicted of a domestic violence felony, while barring gun possession by a police officer who is a domestic violence misdemeanant. *Id.* at 32-33. The court therefore concluded that the statute is "unconstitutional insofar as it purports to withhold the public interest exception [18 U.S.C. 925(a)(1) (Supp. III 1997)] from those convicted of domestic violence misdemeanors." Pet. App. 32.

4. The government filed a petition for rehearing and rehearing en banc. See Pet. App. 3. The panel granted the petition. *Id.* at 45. After additional briefing and oral argument, the court of appeals withdrew its prior opinion and issued a new decision rejecting petitioner's constitutional claims and affirming the district court's judgment. *Id.* at 1-20.

a. The court of appeals explained that because domestic violence misdemeanants are not a suspect class for equal protection analysis, and Section 922(g)(9) does not infringe any fundamental right, the statutory classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Pet. App. 8 (quoting *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). The court held that the challenged provision is supported by a rational basis. The court acknowledged that "[t]reating misdemeanants more harshly than felons seems irrational in the conventional sense of that term." Pet. App. 8. It concluded, however, that

> on reflection it appears to us not unreasonable for Congress to believe that existing laws and practices adequately deal with the problem of issuance of official firearms to felons but not to domestic vio-

> lence misdemeanants—adequately at least in the sense of explaining how Congress might have found that as to felons the net benefit of federal prohibition (and non-exemption) fell below the net benefit of prohibition and non-exemption as to misdemeanants. Although state laws do not uniformly ban felons from possessing guns * * * nonlegal restrictions such as formal and informal hiring practices may, as the government argues, prevent felons from being issued firearms covered by § 925(a)(1) in a large measure of the remaining cases.

Id. at 9. The court found that, in the absence of evidence negating those propositions, "they indicate that there is a reasonably 'conceivable state of facts' under which it is rational to believe that the felon problem makes a weaker claim to federal involvement than the misdemeanant one." *Ibid.* The court also "reaffirm[ed]" its prior holding that a "special focus on domestic violence misdemeanants, as opposed to other misdemeanants, was not irrational under the norms of equal protection jurisprudence." *Id.* at 11.

b. The court of appeals rejected petitioner's contention that Section 922(g)(9) infringes on fundamental rights protected by the Second Amendment and should therefore be subject to strict scrutiny. Pet. App. 13-15. The court noted that petitioner had presented no "evidence supporting a finding that the disputed rule would materially impair the effectiveness of a militia." *Id.* at 15. The court observed that Section 922(g)(9) "does not hinder the militia service of all police officers, only of domestic violence misdemeanants whose convictions have not been expunged, etc. [Petitioner]

never indicates how restrictions on the latter, relevant class would have a material impact on the militia." *Ibid.*

c. The court of appeals rejected petitioner's Tenth Amendment claim. Pet. App. 15-17. The court explained that "[petitioner's] Tenth Amendment challenge fails because § 922(g)(9) does not force state officials to do anything affirmative to implement its bar on domestic violence misdemeanants' possession of firearms." *Id.* at 15. The court also observed:

> It may commonly be a side effect of federal prohibitions to impair offenders' fitness for service as a police officer. Showing up for work at some spot other than a federal prison is a qualification for most state positions; federal incarceration intrudes inescapably. Of course § 925(a)(1)'s exemption for state-issued weapons protects states from this sort of peripheral interference as to all persons barred by federal law from weapons possession other than domestic violence misdemeanants, but the exemption's existence does not establish it either as a constitutional right or as a baseline for measuring claims under the Tenth Amendment—or any other constitutional provision.

Id. at 17.

d. Finally, the court of appeals held that Section 922(g)(9) is a permissible exercise of Congress's power under the Commerce Clause. Pet. App. 18-20. The court explained that Section 922(g)(9) "contains a 'jurisdictional element': in any prosecution under the provision for possession, the government must prove that the defendant possessed the firearm 'in or affecting commerce.'" *Id.* at 18. The court also observed that its resolution of the Commerce Clause issue is

consistent with decisions issued by "all the numbered circuits." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Every court of appeals that has considered the question has held that Section 922(g)(9)'s application to state and local employees does not violate the Tenth Amendment.[2] See Pet. App. 15-17; *Gillespie* v. *City of Indianapolis*, No. 98-2691, 1999 WL 463577, at *10-*11 (7th Cir. July 9, 1999); *Hiley* v. *Barrett*, 155 F.3d 1276 (11th Cir. 1998) (affirming and adopting *National Ass'n of Gov't Employees, Inc.* v. *Barrett*, 968 F. Supp. 1564, 1575-1576 (N.D. Ga. 1997)). See also *United States* v. *Meade*, 175 F.3d 215 (1st Cir. 1999) (rejecting Tenth Amendment challenge to 18 U.S.C. 922(g)(8) (1994 & Supp. III 1997)). That holding is correct and consistent with this Court's precedents. In *New York* v. *United*

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[2] Although we agree with the court of appeals that petitioner's Tenth Amendment claim lacks merit, we believe that the court erred in holding that petitioner has standing to raise that claim. The court held that petitioner had standing to represent the interests of members who are CLEOs. See Pet. App. 11-13, 23-27. A CLEO would have standing to raise a Tenth Amendment claim, however, only if he was authorized by state law to do so on behalf of the State. See *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118, 144 (1939); but see *Gillespie* v. *City of Indianapolis*, No. 98-2691, 1999 WL 463577, at *4-*7 (7th Cir. July 9, 1999) (concluding that *Tennessee Elec. Power Co.* has been superseded by more recent decisions and that private plaintiffs may raise Tenth Amendment claims). In our view, petitioner—a private organization—cannot appropriately sue as the representative of members who themselves could sue only on behalf of their respective States.

States, 505 U.S. 144 (1992), the Court emphasized the longstanding distinction between laws passed by Congress "requiring or prohibiting certain acts," and laws that "directly * * * compel the States to require or prohibit those acts." *Id.* at 166; see also *South Carolina* v. *Baker*, 485 U.S. 505, 514-515 (1988). Section 922(g)(9) does not compel the States to enact regulations, nor does it commandeer state officials to implement a federal program. Rather, Section 922(g)(9) regulates the behavior of individuals, making it a federal crime— enforceable by federal authorities and prosecutable in the federal courts—for a category of persons deemed unsuitable by Congress to possess or receive firearms in or affecting commerce.

Petitioner argues that barring certain persons with the predicate criminal record from carrying an interstate firearm improperly displaces the discretion of state and local government to entrust such individuals with firearms. As the Seventh Circuit recently explained in upholding Section 922(g), however, "it [is not] constitutionally significant that the firearms ban now happens to include individuals employed in state and local law enforcement or who would otherwise be qualified to serve in state militias." *Gillespie*, 1999 WL 463577, at *11. Section 922(g)(9) "regulates individual behavior * * *. It singles out no one by occupation or affiliation with state or local government." *Ibid.* To the extent that the statute renders certain individuals ineligible for employment in state and local law enforcement and ineligible to serve in a state militia, "it does so incidentally." *Ibid.* Thus, "Congress has not superseded the criteria state and local governments employ to select those serving on their behalf; it has instead, in the exercise of its authority over interstate commerce, merely rendered some individuals unable, as

a practical matter, to meet one of the criteria that state and local governments have themselves established." *Ibid.*[3]

2. The court of appeals correctly rejected petitioner's claim that Section 922(g)(9) should be subjected to strict scrutiny based upon its alleged interference with rights protected by the Second Amendment. See Pet. App. 13-15. In *Lewis* v. *United States*, 445 U.S. 55, 65 & n.8 (1980), this Court held that the federal bar on

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[3] Under 18 U.S.C. 922(d)(9) (Supp. III 1997), one who knowingly transfers a firearm to a person previously convicted of a domestic violence misdemeanor is subject to possible criminal penalties. See also 18 U.S.C. 924(a)(2) (1994 & Supp. III 1997) (establishing criminal penalties for any person who "knowingly violates" Section 922(d)). State supervisory officials who knowingly issue firearms to domestic violence misdemeanants would be covered by that provision. Section 922(d)(9) is not targeted at state officials, however, nor does it require state officials to assist in the enforcement or administration of federal law. Rather, it (like Section 922(g)(9)) simply encompasses state officials within the class of individuals subject to a generally applicable prohibition. Application of Section 922(d)(9) to state officials in that manner raises no genuine constitutional concern. Compare *Printz* v. *United States*, 521 U.S. 898, 913 (1997) (noting "the duty owed to the National Government, on the part of *all* state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law").

Petitioner contends that "the criminal penalty for transfer [of a firearm] to a domestic violence misdemeanant is a *de facto* command from the federal government to a CLEO to disarm any state officer otherwise entitled to perform his firearm-related duties." Pet. 11. That claim is without basis. As the court of appeals recognized, neither the statute itself nor the implementing instructions given by the Bureau of Alcohol, Tobacco and Firearms suggest that state officials are required to "disarm" persons covered by Section 922(g)(9), or otherwise to assist in the enforcement of the federal prohibition. See Pet. App. 16.

receipt and possession of firearms by felons was subject only to rational basis review. The Seventh Circuit, the only other court of appeals that has addressed such a challenge to Section 922(g)(9), also rejected it. *Gillespie*, 1999 WL 463577, at *14-*15. See also *National Ass'n of Gov't Employees, Inc.* v. *Barrett*, 968 F. Supp. at 1573 n.11; *United States* v. *Boyd*, No. 99-40001-01-SAC, 1999 WL 318497, at *4 (D. Kan. Mar. 30, 1999).

As the Seventh Circuit explained in *Gillespie*, "[t]he link that the [Second A]mendment draws between the ability 'to keep and bear Arms' and '[a] well regulated Militia' suggests that the right protected is limited, one that inures not to the individual but to the people collectively, its reach extending so far as is necessary to protect their common interest in protection by a militia." 1999 WL 463577, at *14. Under *United States* v. *Miller*, 307 U.S. 174 (1939), the Second Amendment does not apply in the absence of "some reasonable relationship" between the subject of the regulation at issue and "the preservation or efficiency of a well regulated militia." *Id.* at 178. "*Miller* and its progeny * * * confirm that the Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia." *Gillespie*, 1999 WL 463577, at *14. See also *Lewis*, 445 U.S. at 65 n.8 (restriction on possession of firearms by felons does not "trench upon any constitutionally protected liberties"); *United States* v. *Rybar*, 103 F.3d 273, 285-286 (3d Cir. 1996), cert. denied, 522 U.S. 807 (1997); *San Diego County Gun Rights Comm.* v. *Reno*, 98 F.3d 1121, 1124-1125 & n.1 (9th Cir. 1996); *Hickman* v. *Block*, 81 F.3d 98, 101 (9th Cir.), cert. denied, 519 U.S. 912 (1996); *Love* v. *Pepersack*, 47 F.3d 120, 124 (4th Cir.), cert. denied, 516 U.S. 813 (1995);

United States v. *Johnson*, 497 F.2d 548, 550 (4th Cir. 1974).

Section 922(g)(9) "does not hinder the militia service of all police officers, only of domestic violence misdemeanants whose convictions have not been expunged, etc." Pet. App. 15. Because petitioner "never indicates how [such] restrictions on the latter, relevant class would have a material impact on the militia," its Second Amendment claim fails. *Ibid.* See also *Gillespie*, 1999 WL 463577, at *15 (rejecting Second Amendment challenge to Section 922(g)(9) because the plaintiff had failed to demonstrate that "the viability and efficacy of state militias will be undermined by prohibiting those convicted of perpetrating domestic violence from possessing weapons in or affecting interstate commerce.").

3. Under rational basis review, a legislative classification "must be upheld * * * if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). As the court of appeals correctly held (Pet. App. 8-11), Section 922(g)(9) satisfies that standard.

a. Section 922(g)(9) is an entirely reasonable means of removing firearms from likely scenes of domestic violence. Evidence before Congress showed that "the presence of a gun increases the likelihood that a woman will be killed threefold." 142 Cong. Rec. S11,227 (daily ed. Sept. 25, 1996) (Sen. Lautenberg). As one court of appeals recently explained:

> The rationale for keeping guns out of the hands of those convicted of domestic violence crimes is eminently reasonable. Persons convicted of such offenses have, by definition, already employed violence against their domestic partners on one or

> more occasions. Congress could reasonably believe that such individuals may resort to violence again, and that in the event they do, access to a firearm would increase the risk that they might do grave harm, particularly to the members of their household who have fallen victim to their violent acts before.

United States v. *Lewitzke*, 176 F.3d 1022, 1026 (7th Cir. 1999), petition for cert. pending, No. 99-5677; accord *Gillespie*, 1999 WL 463577, at *12-*13; *National Ass'n of Gov't Employees, Inc.* v. *Barrett*, 968 F. Supp. at 1573-1575.

b. In its initial opinion, the court of appeals held that the statutory scheme is irrational because it allows domestic violence felons, but not domestic violence misdemeanants, to possess firearms issued by government agencies. Pet. App. 27-33. On rehearing, however, the court considered the question anew and concluded that the legislative classification is supported by a rational basis. *Id.* at 8-10. The court explained that "on reflection it appears to us not unreasonable for Congress to believe that existing laws and practices adequately deal with the problem of issuance of official firearms to felons but not to domestic violence misdemeanants." *Id.* at 9.[4]

That decision is correct. Congress could rationally have concluded that government agencies generally do not hire violent felons, and that the possession of government-issued firearms by violent misdemeanants

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[4] The court also noted that "Congress's self-limitation here may reflect a legitimate accommodation of the inherent interest in minimizing the scope of potentially intrusive federal legislation." Pet. App. 10.

poses a far more significant real-world problem.[5] The legislative history, moreover, reflects Congress's awareness that acts of violence that would generally be classified as felonies are often classified as misdemeanors when they occur in the domestic context. See 142 Cong. Rec. S10,377-S10,378 (daily ed. Sept. 12, 1996) (Sen. Lautenberg); see also *id.* at S10,380 (Sen. Feinstein); *id.* at S10,379 (Sen. Wellstone); *id.* at S8831 (daily ed. July 25, 1996) (Sen. Lautenberg). Precisely because of that anomalous classification, the perpetrators of domestic violence may evade screening processes that focus on felonies.

c. To support its equal protection argument, petitioner relies (Pet. 18) on *McLaughlin* v. *Florida*, 379 U.S. 184 (1964), *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), and *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). In those cases, however, the Court applied strict scrutiny because the challenged government practices involved the use of racial classifications (*McLaughlin* and *Yick Wo*) or infringed upon a fundamental right (*Skinner*). Under strict scrutiny, it is appropriate to examine whether a statute is underinclusive. Such an analysis has no place under rational basis review, however. See *Williamson* v. *Lee Optical*, 348 U.S. 483, 489 (1955); *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 316 (1993). Absent a showing of invidious discrimination,

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[5] For example, felons are generally prohibited from enlisting in any of the armed forces. See 10 U.S.C. 504. Moreover, as detailed in the government's petition for rehearing, state and local governments overwhelmingly have strict policies against hiring or retaining persons convicted of a violent felony. See Gov't Rehearing Pet. 13 n.6. Although such agencies typically have unambiguous policies against the hiring of felons, they do not generally have such clear policies against the hiring of misdemeanants. *Id.* at 14 n.7.

"it makes no difference" that the classification could logically be applied to an additional category of persons. See *Vance* v. *Bradley*, 440 U.S. 93, 109 (1979).

4. Petitioner contends (Pet. 19-21) that Section 922(g)(9) exceeds Congress's power under the Commerce Clause. As the court of appeals noted, all of the "numbered circuits" have rejected similar Commerce Clause challenges to the various restrictions on gun possession imposed by 18 U.S.C. 922(g). See Pet. App. 18 (citing cases from 11 courts of appeals). The restrictions are constitutional because Section 922(g) bars the specified categories of persons from possessing firearms "in or affecting commerce." 18 U.S.C. 922(g) (1994 & Supp. III 1997). The statute thus contains a jurisdictional element that "ensure[s], through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 561 (1995); see also *Scarborough* v. *United States*, 431 U.S. 563, 564, 575 (1977) (felon's possession of a firearm satisfies the Omnibus Crime Control Act's "in commerce or affecting commerce" requirement if the gun has moved in interstate commerce at any time in the past).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1999

IN THE SUPREME COURT OF THE UNITED STATES

FRATERNAL ORDER OF POLICE Petitioner	)	
vs.	)	No. 99-0106
USA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 2nd day of September 1999.

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September 2, 1999

NO. 99-106

In The

SUPREME COURT OF THE UNITED STATES

FRATERNAL ORDER OF POLICE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

REPLY BRIEF OF THE PETITIONER

On a Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY ARGUMENT

The government's Brief in Opposition relies extensively on a recent Seventh Circuit decision addressing the same amendments to the Gun Control Act at issue in this case.[1] ***See*** Government's Brief at 7-8; 10-11 citing ***Gillespie v. Indianapolis,*** 185 F.3d 693 (7th Cir. 1999), 1999 U.S. App. LEXIS 15117. The government's reliance is misplaced because the Seventh Circuit decision is rooted in prior decisions regarding *private* firearms and this is a first impression case involving *public interest* firearms. ***See*** 18 U.S.C. §925(a) (Supp.III 1997). Both the government and the Seventh Circuit have ignored this Court's express statements that the power to regulate interstate commerce, Art. I, § 8, cl., is intrinsically limited and is not a plenary police power and is extrinsically limited by the Tenth Amendment which reserves whole areas of state sovereignty inviolable. ***See e.g. Gregory v. Ashcroft***, 501 U.S. 452, 461 (1991)(federal government may not displace "state decisions that 'go to the heart of representative government.'")

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1. The Seventh Circuit decision involves a rank and file police officer rather than Chief Law Enforcement Officers (CLEOs). The Seventh Circuit also held the amendments constitutional. The decision came down on July 9, 1999, on or about the time the Petition was filed in this case. Accordingly, Petitioner had no opportunity to alert this Court to the deficits in the Seventh Circuit's discussion of the issues. This Reply will be followed on October 7, 1999 by a Petition for Certiorari from the Seventh Circuit case, ***Gillespie v. Indianapolis,*** 185 F.3d 693 (7th Cir. 1999), 199 U.S. App. LEXIS 15117 A Motion to Consolidate review of the two petitions will be submitted with the ***Gillespie*** petition.

THE GOVERNMENT'S BRIEF IN OPPOSITION FAILS TO IDENTIFY ANY LIMITATION ON FEDERAL POWER OVER STATE OFFICERS THAT DELIVER, RECEIVE, AND TRANSPORT FIREARMS IN THE DISCHARGE OF THEIR STATE DUTIES AND RELIES ON A SEVENTH CIRCUIT OPINION THAT MISTAKENLY CONCLUDES CONGRESS HAS PLENARY AUTHORITY OVER THE PEOPLE'S RIGHT TO SELECT THE CITIZENS IT WISHES TO ARM IN THE PUBLIC INTEREST.

The Government quotes the Seventh Circuit:

> Nor is it constitutionally significant that the firearms ban now happens to include individuals employed in state and local law enforcement or who would otherwise be qualified to serve in state militias.

Government's Brief at 8 citing ***Gillespie,*** 1999 U.S. App. LEXIS 15117 at *31. The Seventh Circuit's conclusion is premised on the rule arising from cases involving private firearms that "Congress has the power to regulate the interstate trade in firearms." 1999 U.S. App. LEXIS 15117 at *28. Completing its mistaken line of reasoning, the ***Gillespie*** court said, "[T]he Supremacy clause [Art. VI, cl.2] permits Congress to trump state policies on subjects that Article I empowers Congress to address." ***Gillespie,*** 1999 U.S. App. LEXIS 15117 at *35. Neither the government nor any Circuit court has identified a single case that declares firearm possession by law enforcement or state militia members a commercial event subject to federal regulation.

Reliance on cases involving private firearms to conclude Congress has power over public interest weapons and rote rejection of the Tenth Amendment claim through talismanic invocation of the Supremacy Clause, is contrary to the history, practice, precedent and

structure of our federal Constitution and amounts to an abdication of the independent judicial duty to evaluate Congressional enactments for *ultra vires* action. ***United States v. Lopez,*** 514 U.S. 549, 563 (1995); ***Alden v. Maine,*** 1999 U.S. App. LEXIS 4374 at *46 ("We reject any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States.").

Moreover, neither the Seventh Circuit's decision, nor the government's brief responds to the contention that the Second Amendment and the Militia clauses, U.S. Const., Art. I, § 8, cl. 15, 16, bar federal interference with public interest weapons issued by the States, regardless of the source or prior transactional history of the firearm. In fact, most cases involving private firearms cite to this Court's cases that expressly reserve some inviolable, protected militia-related space into which a *private* firearm might fall. ***See e.g. United States v. Miller,*** 307 U.S. 174, 178 (1939) (the Second Amendment protects a right to keep and bear a firearm that bears "some reasonable relationship to the preservation or efficiency of a well regulated militia"); ***see also Perpich v. Department of Defense,*** 496 U.S. 334 (1990)(presupposing inviolable right of the States to engage in militia basic training and states' ability to rely on their own Guard in state emergency situations); Firearms Owners' Protection Act, §1(b), 100 Stat. 449 (1986) (codified at 18 U.S.C. §926 (1986))(hereinafter "FOPA")(noting GCA purpose of preserving Second and 10th Amendment rights) If *private* firearms may be shielded from federal regulation by a connection to a State militia, it is

inescapably evident that *public interest* firearms relied upon by the People to enforce executive and judicial decrees, and to protect their interests in times of emergency, are beyond the reach of federal control under the commerce clause. ***See e.g.*** 18 U.S.C. §925 (1994)

In the absence of a construction of the Second Amendment and Militia clauses by this Court that authorizes Congress to control state firearm possession through its commerce clause power, there is no textual basis for the asserted power. This Court recently said, the Federal Government,

> [C]an claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

Alden v. Maine 1999 U.S. LEXIS 4374 at *58 (citations omitted)

Whether expressed as an intrusion upon the State's prerogative to establish officer qualifications under the Militia clause and ***Gregory v. Ashcroft***, 501 U.S. 452, 460 (1991) or an intrusion into inviolable areas of state sovereignty carved out by the Second Amendment and Militia clauses, a serious federalism question exists that cannot be brushed aside by citation to cases authorizing federal control over privately trafficked and possessed firearms. The question before this Court is whether Congress has the power to interfere with the People's right to arm its citizens with public interest weapons, not whether Congress has the power to regulate purely private firearm transactions and possession.

> [E]ven as to matters within the competence of the National Government

> * * * the States retain "a residuary and inviolable sovereignty."

Alden v. Maine, 1999 U.S. App. LEXIS 4374 at *16 (citing The Federalist No. 39).

> E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . .

New York v. United States, 505 U.S. 144, 166 (1992). Under the government's reading of the Constitution and this Court's decisions, 18 U.S.C. §925(a) is simply Congress' statement of the extent of federal displacement of state prerogative. By this rationale, the gate is open for Congress to effectively disarm any state militia and any law enforcement officer and any State governor by simply declaring all misdemeanor convictions, including traffic offenses, trigger new federal firearm possession bans. Congress is mistaken about the extent of its powers; if §925(a)(1) did not exist, it would have to be invented. It is the provision that allowed the Gun Control Act of 1968 to pass Tenth Amendment, Second Amendment and Militia Clause muster. ***See e.g.*** Firearms Owners' Protection Act, §1(b), 100 Stat. 449 (1986) (codified at 18 U.S.C. § 926 (1986))(hereinafter "FOPA")(noting GCA purpose of preserving Second and 10th Amendment rights); ***see also Printz v. United States***, 521 U.S. 898, 905 91997)(historical evidence that "earlier Congresses avoided use of [the] highly attractive power [to compel state executive officers to administer federal programs]" gave us "reason to believe that the power was thought not to exist"); ***accord Alden v. Maine,*** 1999 U.S. LEXIS 4374 at *65 (citing ***Printz*** noting early Congressional practice suggests no power over state issued firearms).

THE GOVERNMENT'S BRIEF IN OPPOSITION RESURRECTS THE DISCREDITED NOTION THAT THE FEDERAL GOVERNMENT MAY OBVIATE THE TENTH AMENDMENT BY DIRECTLY CONSCRIPTING INDIVIDUAL STATE OFFICERS RATHER THAN THE STATES.

It is undisputed that the Bureau of Alcohol, Tobacco and Firearms construe the 1996 GCA amendments as imposing obligations upon CLEOs. ***See A/53-58*** (Open Letter from ATF to CLEOs) Despite the government's assertion to the contrary, Government's Brief at fn3, it is impossible to read the criminal penalties for transfer of a weapon to a person disabled by 18 U.S.C. §922(g)(9) as anything but a federal command to a state CLEO to refuse to arm a police officer in good standing under state law. ***See*** 18 U.S.C. §922(d)(9) and 18 U.S.C. §924(a)(2). CLEOs provide public interest weapons to the rank and file and it is undisputed that CLEOs are required to deliver firearms to sworn officers pursuant to the CLEOs' state-law based duties.

> The Brady Act, the dissent asserts, is different from the "take title" provisions invalidated in New York because the former is addressed to individuals – namely CLEOs – while the latter were directed to the State itself. That is certainly a difference, but it cannot be a constitutionally significant one. While the Brady Act is directed to "individuals," it is directed to them in their official capacities as state officers; it controls their actions, not as private citizens, but as the agents of the State. * * *
>
> And the same must be said of a directive to an official in his or her official capacity. To say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance.

Printz, 521 U.S. 898, ___, 117 S.Ct. 2365 at 2382 (1997). Criminal penalties for refusal to carry out a federal mandate fall within the bar on state officer conscription described in the

foregoing quotation from ***Printz.***

CONCLUSION

As the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' entitlement to select its militia officers and to arm those it deems best suited to carry public interest weapons is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today. The 1996 GCA amendments violate the structure of federalism by impugning the States' inviolable authority secured by the Second Amendment and Militia clauses. The possession or delivery of a firearm by a state officer executing state duties is, quite simply, not a commercial event within the purview of Congress' commerce clause authority.

The principle that "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States", ***New York, supra,*** 505 U.S. at 166, should not be taken as an authorization to achieve indirectly that which cannot be directly achieved. ***Accord Printz, supra,*** 521 U.S. at 919-920 (quoting The Federalist No. 15, at 109). Criminal penalties that force an officer of a state to choose between fulfilling state-law duties or facing federal criminal prosecution constitutes an end-run around the bar raised against federal interference with State sovereignty.

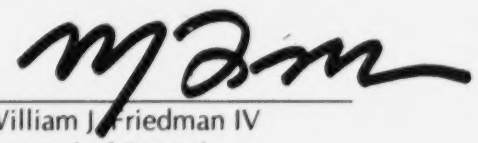
As this Court recently said in ***Alden,*** 1999 U.S. LEXIS 4374 at *41-42, reliance on the mere words of the Eleventh Amendment alone "would be to engage in the type of ahistorical

literalism we have rejected in interpreting the scope of the States' sovereign immunity..." To construe the Second Amendment as a nullity and to render the Tenth Amendment useless in settings where federal criminal penalties compel action by state officers, is to usurp the powers reserved to the People. Such a strained reading of the Constitution cannot stand.

> It seems to be an obvious consequence that as a State can only perform its functions through its officers, a restraint upon them is a restraint upon its sovereignty from which it is exempt without its consent in the state tribunals, and exempt by the Eleventh Amendment of the Constitution of the United States...

General Oil Co. v. Crain, 209 U.S. 211 (1908) Control over public interest firearms confers a power and a leverage over the States that is not contemplated by our constitutional design and foreshadows a potential national power that poses a severe and notorious danger to the States and their resources.

Respectfully submitted,



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I hereby certify that the original and all copies required by rule of the foregoing Reply Brief were sent by Federal Express Seth Waxman, Solicitor General, United States Department of Justice, 950 Pennsylvania Ave., NW, Washington D.C. 20530-001 this 6th day of October 1999.

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